TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 599

McCORMICK & COMPANY, INC., AND DURHAM BROS., INC., APPELLANTS,

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

FILED DECEMBER 29, 1931

(36,413)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 20, 1932

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[fol. 1] [Caption omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN WEST VIRGINIA

In Equity. No. 2866

McCormick & Co., Inc., a Corporation, and Durham Bros. Co., Inc., a Corporation, Plaintiffs,

vs.

W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, Defendants

Bill of Complaint—Filed Dec. 24, 1930

[fol. 2] To the Honorable George W. McClintic, Judge of the District Court of the United States for the Southern District of West Virginia:

I

The plaintiff, McCormick & Co., Inc., is a corporation organized under the laws of the State of Maryland, having its principal office and place of business in the City of Baltimore in said state, and the plaintiff, Durham Bros. Co., Inc., is a corporation organized under the laws of the State of Virginia, and having its principal office and place of business in the City of Roanoke in said state. They file this bill of complaint on their own behalf and for the benefit of numerous other non-residents of the State of West Virginia, all of whom (including the plaintiffs) are manufacturers of and/or wholesale dealers in commercial products containing as a necessary solvent or preservative ethyl alcohol, which products are used and usable exclusively for medicinal, mechanical, toilet and culinary purposes, and which are manufactured and sold under permits issued by the United States Bureau of Industrial Alcohol and approved by the United States Bureau of Prohibition, and none of which products are intoxicating liquors or fit for beverage purposes within the meaning of the laws of the United States. All of said manufacturers and/or

wholesale dealers, including the plaintiffs named herein, desire to ship said products from without the state of West Virginia to purchasers within said state for resale for the uses and purposes aforesaid.

Plaintiffs say that the question or questions here involved are of common or general interest to all of the persons, firms and corporations for whose benefit this suit is brought, and that said persons, firms and corporations constitute a class so numerous as to make it impracticable to bring them all before this Court; said persons, firms and corporations being more than 250 in number; and for said reasons the plaintiffs file this bill on behalf of all members of said class, as provided by the equity rules of the courts of the United States.

The defendant, W. G. Brown, is the regularly appointed State Commissioner of Prohibition of the State of West Virginia, who is charged with the duty of superintending [fol. 3] the enforcement of the laws of said state with respect to the manufacture, possession and sale of intoxicating liquors. The defendant, Howard B. Lee, is the regularly elected and qualified Attorney General of the State of West Virginia, who is charged with the duty of enforcing the laws of the State of West Virginia, including particularly the laws relating to the manufacture, possession and sale of intoxicating liquors. Both defendants are residents of the State of West Virginia and of the Southern district thereof.

II

Plaintiffs are advised and charge that this Court has jurisdiction of this suit for the following reasons:

(1) The plaintiffs and the defendants are, respectively, citizens of different states as hereinbefore shown.

(2) The matter in controversy arises under the constitution and laws of the United States, and, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

(3) Plaintiffs seek in this suit to redress the deprivation, under color of unlawful regulations by the defendant W. G. Brown, of rights, privileges and immunities secured to the plaintiffs by the constitution of the United States, to-wit,

the right to ship and transport the said products manufactured and/or sold by them in interstate commerce free from unlawful restriction or regulation by said defendant Brown.

III

Plaintiff McCormick & Co., Inc., owns and operates, and for more than forty years has operated, in the City of Baltimore, Maryland, a plant for the manufacture of various products sold and used for toilet and culinary purposes. In addition to its manufacturing department, said plaintiff also maintains an extensive marketing organization, employing salesmen and special representatives who take orders for sales and deliveries to wholesale and retail dealers in practically all parts of the United States. [fol. 4] Many of the products manufactured by said plaintiff contain no ethyl alcohol whatsoever, but approximately twenty-five per cent thereof, as measured by the sale price of said products, consists of food stuffs and toilet articles containing from four per cent to ninety per cent ethyl alcohol by volume. The value of such food stuffs and toilet articles containing ethyl alcohol sold and transported into the State of West Virginia during the year 1929 was approximately Thirteen Thousand Dollars ($13,000.00), and during the first nine months of the year 1930, approximately Eight Thousand Dollars ($8,000.00).

Under the provisions of the National Prohibition Act of the United States, and Acts of Congress amending the same, said plaintiff, in order to manufacture, transport and sell said products containing ethyl alcohol, is required to have issued to it a permit authorizing it to manufacture, transport and sell products for use for medicinal, mechanical, toilet and culinary purposes, provided that the same are determined by the issuing authority to be unfit for use for beverage purposes. Prior to July 1, 1930, such permits were granted by the Commissioner of Internal Revenue of the United States, but by the Act of Congress effective on said date, the provisions of said National Prohibition Act were amended so as to provide that all such permits were thereafter to be issued by the Bureau of Industrial Alcohol, subject to the approval of the Attorney General of the United States.

For more than ten years said plaintiff has been operating its business under successive annual permits authorizing it to withdraw and use intoxicating liquors, including principally ethyl alcohol for use in the manufacture of said products in compliance with said National Prohibition Law. A photostatic copy of the current permit is exhibited herewith, designating "Plaintiffs' Exhibit A". In addition to said basic permit, said plaintiff, from time to time has applied for and has had issued to it, a supplemental permit for the manufacture of each specific product formulated by it, certifying that the same has been determined by said issuing authority to comply with all of the provisions of the [fol. 5] National Prohibition Law. At the present time, said plaintiff is engaged in the business of manufacturing and selling many of the products approved in said permits, which products are unfit for beverage purposes and non-intoxicating in fact, and is delivering the same through shipments in interstate commerce to dealers in West Virginia, who hold permits from the Commissioner of Prohibition of said state, authorizing them to handle such products, and during the next succeeding year, said plaintiff will, unless prevented by unforeseen contingencies, ship into the State of West Virginia, approximately the same amount of said products as during the year immediately preceding the bringing of this suit. Said plaintiff manufactures and sells none of said products containing ethyl alcohol except under said permits issued as aforesaid.

Said plaintiff states that all of the manufacturers on whose behalf this suit is brought are also engaged in the business of producing commodities containing ethyl alcohol, under permits heretofore issued by the Commissioner of Internal Revenue of the Bureau of Industrial Alcohol, and, like said plaintiff, are engaged in the business of selling and shipping the same through interstate commerce to dealers in West Virginia, holding permits from the Prohibition Commissioner of said state.

Plaintiff Durham Bros. Co., Inc., is a dealer in groceries and food products selling at wholesale to retail dealers in the State of West Virginia and elsewhere, and said plaintiff desires to sell and ship in interstate commerce in the State of West Virginia, among other commodities, flavoring extracts and other liquids containing ethyl alcohol, all of which are non-intoxicating and unfit for beverage purposes, and

which are manufactured exclusively by persons, firms and corporations holding proper permits therefor issued by said Commissioner of Internal Revenue or the Bureau of Industrial Alcohol. Said Durham Bros. Co., Inc., desires to sell only to those retail dealers in West Virginia who hold permits from the Prohibition Commissioner of said state authorizing them to handle such products.

All other dealers on whose behalf this suit is brought are also engaged in the business of selling at wholesale to retail dealers in the State of West Virginia, and elsewhere, and of [fol. 6] shipping into said state, among other commodities, liquids containing ethyl alcohol, all of which are non-intoxicating and unfit for beverage purposes, and which are manufactured exclusively by persons, firms and corporations holding proper permits issued by said Commissioner of Internal Revenue or the Bureau of Industrial Alcohol. All of said dealers sell only to those retail dealers in the State of West Virginia who hold permits from the Commissioner of Prohibition of the State of West Virginia.

Neither the named plaintiffs nor any parties represented by them herein make any sales of the products herein mentioned in the State of West Virginia, or ship any such products into said state except by means of shipments in interstate commerce.

IV

By amendment to the constitution of the State of West Virginia and by acts of the legisl-ture thereof originally adopted in the year 1913, and by the several amendments to said acts, the manufacture, sale; keeping or storing for sale of intoxicating liquors, except as specifically permitted in said acts, were forever prohibited. By said specific exceptions in said acts, it is provided, among other things, that the sale and keeping for sale of any United States pharmacopœia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law, may be sold and kept and stored for sale, provided that "no one shall manufacture, sell, keep for sale purchase or transport any liquors, as defined in section one of this act and as herein excepted without first obtaining a permit from the Commissioner of Prohibition so to do". Said acts further provide that manufacturers and wholesale dealers

shall pay a fee of fifty dollars for each permit, and that all purchasers in wholesale quantities of liquors, for sale at retail, except licensed druggists, shall pay a fee of two dollars for each permit.

Defendant W. G. Brown, purporting to act in his capacity as Commissioner of Prohibition, from time to time, since the enactment of said statutes by the legislature of West Virginia has promulgated certain regulations, the latest of [fol. 7] which is designated as Ruling Number Five, effective January 1, 1931, wherein it is provided that many of the products manufactured and/or sold by these plaintiffs and those on whose behalf this suit is brought can be sold in the State of West Virginia or shipped into said state in interstate commerce in the manner hereinafter set out, only under permits obtained from said Commissioner of Prohibition. In addition to said regulations said commissioner has caused to be published a list of those who hold permits from said commissioner for the sale of products containing ethyl alcohol in said state, and has stated that all products purchased from dealers who do not hold such permits are subject to confiscation and seizure by him and that it is his intention to seize, confiscate and destroy all products purchased from dealers who do not hold permits as aforesaid, and that all persons selling such products or keeping or storing the same for sale will be prosecuted under the laws of the State of West Virginia; which threatened action on the part of said commissioner would result in the disorganization and destruction of a large part of plaintiffs' business, the loss of many of their customers, and the depreciation, if not destruction, of their good will and property, all to the irreparable damage of the plaintiffs and their stockholders, and which said injury and damage would be incapable of admeasurement and adjudication in an action at law.

True copies of said list of permittees and said Ruling Number Five marked, respectively, "Plaintiffs' Exhibit B" and "Plaintiffs' Exhibit C", are filed with this bill and plaintiffs ask that the same be read and considered as a part hereof.

V

Plaintiffs say that although they and all those for whose benefit this suit is brought are non-residents of the State of

West Virginia, and although all of the products containing Ethyl Alcohol which they sell and ship or desire to sell and ship, to dealers in said state, are approved and legitimate articles of sale and commerce and proper to be transported into the State of West Virginia solely by means of inter-
[fol. 8] state commerce, they have either procured from the commissioner of prohibition the permits which have been demanded by him, at the cost of $50.00 annually for each permit, or have refused to procure said permits, and refrained from shipping said products into said State. Plaintiffs say, that they are advised and believe that the business in which they are engaged is a lawful business, both under the laws of the United States and of the State of West Virginia, and particularly that the sales of all of said products to dealers in the State of West Virginia, all of whom hold permits from said Commissioner of Prohibition, are lawful transactions, and constitute transactions in interstate commerce, and that the demand of the defendant Brown in his capacity of Commissioner of Prohibition is an unlawful attempt to hinder, obstruct and restrain the interstate commerce and business in which these plaintiffs, and those for whose benefit this suit is brought, are engaged. They charge that said Commissioner of Prohibition is utterly without right or authority to require a permit to be issued to the plaintiffs or either of them, or to any of the parties represented by them, for carrying on said business, or to levy a tax thereon or require the payment of a permit fee therefor; notwithstanding which the said defendant W. G. Brown will require the plaintiffs to procure such permit on or before January 1, 1931, for the calendar year 1931, and require each of them to pay a fee of $50.00 therefor; and the said defendant Howard B. Lee will attempt to prosecute these plaintiffs for any failure on their part to procure such permit and pay said fees, unless restrained by this Court; and that there are no means provided by the laws of said state to recover said fees so illegally required to be paid.

VI

Plaintiffs are without remedy at law in the premises, and only in a suit of this nature and by the injunctive processes of this Court can they be fully protected in the enjoyment of their property and rights as aforesaid; the granting of

the injunctive process as hereinafter prayed will prevent the multiplicity of suits and prosecutions, and the questions herein involved can be adequately determined only in a suit of this nature. In consideration whereof, plaintiffs pray: [fol. 9] That the defendant W. G. Brown, Commissioner of Prohibition, and the defendant Howard B. Lee, Attorney General of the State of West Virginia, and their successors, assistants deputies, and agents, be enjoined and restrained, by the order and injunction of this Court, from requiring or attempting to require, either directly or indirectly, said plaintiffs and those for whom they sue, to procure and hold a permit issued by the defendant W. G. Brown, and from exacting or attempting to exact the payment by the plaintiffs of a fee in any sum or amount, and from bringing or permitting to be brought any proceeding at law or in equity for the purpose of requiring the procurement of said permits, and from causing the plaintiffs, or either of them, or any other person or corporation similarly situated, to be arrested for refusing to procure such permit, and from taking any other action in any manner to prevent or interfere with the business of these plaintiffs, or either of them, or of any person or corporation similarly situated, and that an order issue herein directed to the above named defendants, requiring them to show cause why a preliminary injunction should not issue as prayed for herein, and that a temporary restraining order may issue pending the hearing of said order to show cause.

Philip C. Friese, Rummel, Blagg & Stone, Solicitors for Plaintiff.

December 18, 1930.

Duly sworn to by Willoughby W. McCormick. Jurat omitted in printing.

[fol. 10] PLAINTIFFS' EXHIBIT "A" TO BILL OF COMPLAINT

Form 1405-Revised Apr., 1928. Serial No. Md-H-291

Treasury Department, U. S. Prohibition Service

Permit Issued under the National Prohibition Act as Amended and Supplemented and Regulations Issued Thereunder

Office of Supervisor of Permits, 4th Administrative District

To McCormick and Company, Inc., N. W. corner Light & Barre Streets, Baltimore, Maryland:

Application having been duly presented and approved, you are hereby authorized and permitted, subject to the conditions hereinafter stated and all provisions of the laws relating to intoxicating liquor of any State in which any of the privileges herein conferred are exercised, to use intoxicating liquors for other than beverage purposes, to wit:

In the manufacture of preparations listed on applications Form 1404 Supplementals, marked "Approved" by this office.

In the manufacture of U. S. P. and N. F. preparations fit and unfit for beverage purposes.

For general laboratory purposes, necessary to experiment and research work, in accordance with the provisions of Regulations 2, Section 1131.

This permit is also issued to reclaim alcohol by redistillation from the marc of percolation incident to the manufacture of preparations listed and authorized herein. The [fol. 11] alcohol so recovered to be used in products of the same class in which it originally entered.

The quantity of intoxicating liquor (as defined in Section 1, Title II, of the National Prohibition Act) which may be produced or obtained by the permittee during any calender year (or proportionately for the remainder of the calendar year in which this permit is originally issued), shall be the quantity necessary to meet the legitimate needs of the permittee for all operations under such permit, but not to exceed 29,473.5 wine gallons of alcohol, x wine gallons of whiskey, 52. wine gallons of brandy, and 52. wine

gallons of wine: Provided, however that the permittee shall not possess more than 5 per cent of the maximum annual allowances of Alcohol above stated at any one time, and 100% of brandy and 100% of wine.

The penal sum of the bond required to support this permit shall not be less than $12,000.00.

The following stipulations and conditions shall be faithfully observed and performed, and any act done or omitted to be done contrary to the terms and intent of such stipulations and conditions, or any misrepresentation of any fact, found to have been made in securing this permit, shall be deemed a lack of good faith in conforming to the provisions of the National Prohibition Act, as amended and supplemented, and shall constitute good cause for the issuance of a citation and the revocation of this permit:

1. That the permittee and all persons employed by him in any connection with such permit privileges, and all other persons employed by him while on the permit premises, will in good faith observe and conform to all the terms and conditions of this permit; all laws of the United States relating to the manufacture, taxation and control of, and traffic in, intoxicating liquors; all regulations made pursuant to law which are now, or may hereafter be, in force; and all the liquor laws of the State in which the permittees business is located and of all States in which the permit privileges may be exercised.

2. That the permittee will provide and maintain, on the premises described herein, a safe and secure place of stor- [fol. 12] age for all intoxicating liquors possessed under authority of this permit, same to be of sufficient capacity to hold the maximum quantity of intoxicating liquors which may be so possessed by permittee at any one time, and to be kept under lock and accessible only to the permittee and his responsible agents, and to be subject to inspection and approval of the Administrator; description of said place of storage being as follows: Room 20'x20' having a capacity of 60—52 gallon drums, constructed of concrete and corrugated iron, provided with a wood door and padlock and situated on the 6th floor at Light & Barre Sts., Baltimore, Maryland, and that all intoxicating liquors received and possessed by authority of this permit will be stored and

kept in the above-described place of storage, and in no other place except upon approval by the Administrator.

3. That the permittee will keep the files and records pertaining to the business conducted under this permit on the premises covered by the permit, and will make all reports required of him by law or regulation, and will upon proper request, promptly allow and permit inspection to be made by any official or officer of the Bureau of Prohibition, of such files and records, and of all the premises and property used for or in connection with any operations under this permit, including the stocks of intoxicating liquors on hand, and all vehicles passing into or out of said premises.

4. That the actual management of the business and operations to be carried on under this permit will be under the direct charge and supervision of John Glassford, Chief Chemist, whose business address is % McCormick & Company, Inc., Light & Barre Sts., Baltimore, Md., if a change is made in the management of said business and operations. notice thereof, stating the name and address of the new or additional manager, shall be sent by registered mail to the Administrator of the district in which the permit was issued; if the Administrator, within 15 days after receipt of such notice shall notify the permittee that he disapproves such new or additional manager, such change in [fol. 13] management shall not thereafter be effective as to the permit privileges.

5. That if the permittee is a corporation, in the event of any change in the officers or directors of said corporation it will immediately notify the Administrator of the district in which this permit is issued of such change. If such change in such officers or directors effects a change in the management of its operations under the permit, notice thereof must be given to the Administrator by registered mail, and such change may become ineffective as to the permit privileges by the disapproval of the Administrator as provided in paragraph 4.

6. That the permit privileges herein conferred shall not be transferred, and in case of sale or transfer of the business in connection with which the permit activities are conducted, the permittee will submit to the Administrator a statement, under oath, showing the name and address of the purchaser, and any other person directly or indirectly

interested in the enterprise, the amount paid for the business, the balance due, if any, and how secured. That, if permittee is a corporation, any sale, pledge, or other disposition of its corporate stock which results in transferring the control and management of the business of the corporation shall terminate this permit. That, if permittee is a partnership, the sale of a partnership interest shall be deemed to be a sale or transfer of the business.

The application on which this permit is issued and all data, written statements, affidavits, and other documents submitted in support thereof, shall be deemed to be part of this permit.

This permit is effective from the date hereof, and will remain in force until December 31, 1931, unless revoked, suspended, or renewed as provided by law or regulations. All provisions of law and regulations relating to permits are to be considered part of this permit and to be included in the provisions and conditions of this permit. If this permit requires a supporting bond, the failure to keep such bond in force will ipso facto terminate this permit; and this permit may be revoked, suspended, modified, amended, [fol. 14] supplemented, extended, or renewed in the manner and for the causes set forth in regulations or specifically set forth herein, or agreed to by the permittee, or as otherwise provided by law.

Dated this 8th day of December, 1930.

Thos. E. Suint, Supervisor of Permits.

PLAINTIFFS' EXHIBIT "B" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In Equity

McCORMICK & Co., INC., a Corporation, and DURHAM BROS. Co., INC., a Corporation, Plaintiffs,

vs.

HOWARD B. LEE, Attorney General of West Virginia, and W. G. BROWN, State Commissioner of Prohibition, Defendants

List of Persons, Firms and Corporations in Whose Behalf This Action is Brought

Abbott Laboratories ..... North Chicago, Illinois

Abner Royce Co., The	Cleveland, Ohio
Allen & Co., Mark W.	Detroit, Michigan
Allied Drug Products Co.	Chattanooga, Tennessee
American Commercial Alcohol Corporation	Philadelphia, Pa.
American Druggists Syndicate	Long Island City, N. Y.
American Products Co., Inc.	Cincinnati, Ohio
American Solvents & Chem. Sales Corporation	New York City, N. Y.

[fol. 15]

American Wholesale Corp.	Baltimore, Maryland
Arden, Elizabeth	New York City, N. Y.
Atlantis Sales Corporation	Rochester, New York
Austin, Nichols & Co., Inc.	Brooklyn, New York
Ayer, Inc., Harriet Hubbard	New York City, N. Y.
Bailey Grocery Co., The C. L.	Marietta, Ohio
Baily & Son, James	Baltimore, Md.
Baltimore Drug Co., The	Baltimore, Md.
Banfi Products Corporation	New York City, N. Y.
Beal & Steele Drug Co., The	Steubenville, Ohio
Bingham Co., The W.	Cleveland, Ohio
Blackstone Manufacturing Co.	Newark, N. J.
Blair Laboratories, Dr.	Lynchburg, Va.
Budeker Drug Co.	Richmond, Virginia
Boncilla Laboratories, Inc.	Indianapolis, Indiana
Bonheiur Co., Inc., The	Syracuse, New York
Bowman Bros. Drug Co., The	Canton, Ohio
Boyer Chemical Laboratory, Inc., The	Chicago, Ill.
Brewer & Co., Inc.	Worcester, Mass.
Brooks Co., Inc., The	Attica, N. Y.
Brown & Bro. Co., Wm. H.	Baltimore, Md.
Burnett Co., Joseph	Boston, Mass.
Button Corp., Geo. W.	New York City, N. Y.
Byrnes & Kiefer Co.	Pittsburgh, Pa.
California Perfume Co.	New York City, N. Y.
Carlova, Inc.	Binghamton, N. Y.
Carr, Owens & Co., Inc.	Baltimore, Md.
Chamberlain Medicine Co.	Des Moines, Iowa
Cheramy, Inc.	New York City, N. Y.
Christy, Inc	Newark, N. J.

Cincinnati Economy Drug Co.	Cincinnati, Ohio
Cincinnati Soap Co., The	Cincinnati, Ohio

[fol. 16]

Clifton Forge Grocery Co., Inc.	Clifton Forge, Va.
Colgate-Palmolive-Peet Co.	Chicago, Ill.
Commercial Laboratories, Inc.	Newark, N. J.
Cooper & Sons, T. J.	Winchester, Va.
Coty, Inc.	New York, N. Y.
Davis Manufacturing Co., Inc.	Knoxville, Tenn.
Dealers Sales Corp.	St. Louis, Mo.
DePree Co., The	Holland, Mich.
DeVore Mfg. Co., The	Columbus, Ohio
Dill Co., Inc., The	Norristown, Pa.
Direct Sales Co., Inc.	Buffalo, N. Y.
D'Orsay Perfumeries Corp.	New York City, N. Y.
Dyke-Keys Co., The	Steubenville, Ohio
Earle, Marie, Inc.	New York City, N. Y.
Elipse Grocery & Milling Co.	Bluefield, Va.
Elk Manufacturing Co.	Jellico, Tenn.
Elmo, Inc.	Philadelphia, Pa.
Esteva, C.	New York City, N. Y.
Fahrney & Sons Co., Dr. Peter	Chicago, Ill.
Federal Products Co., The	Cincinnati, Ohio
Fitch Co., The F. W.	Des Moines, Iowa
Floral Products Co., Inc	New York, N. Y.
Foley & Co.	Chicago, Ill.
Frank Tea & Spice Co., The	Cincinnati, Ohio
Fries & Fries Co., The	Cincinnati, Ohio
Furst & Thomas	Freeport, Ill.
Gandolfi & Co., L.	New York, N. Y.
Gibson, Inc., Guy T.	New York City, N. Y.
Gilbert Bros. & Co., Inc.	Baltimore, Md.
Gilmore Drug Co., W. J.	Pittsburgh, Pa.
Henry B. Gilpin Co.	Baltimore, Md.
Graham & Co., Wm.	Baltimore, Md.
Guerlain Perfumery Corp.	New York City, N. Y.
Hale, Justis Drug Co., The	Cincinnati, Ohio
Hampton Grocery Co.	Catlettsburg, Ky.

[fol. 17]

Harley Co., E. C.	Dayton, Ohio
Heberling Co., G. C.	Bloomington, Ill.

Herb Medicine Co., The	Springfield, Ohio
Herpicide Co., Inc., The	Detroit, Mich.
Hirsh & Son, Leon	New York City, N. Y.
Hite Co., Inc., S. P.	Roanoke, Va.
Hollander Bros. Drug Co.	Rankin, Pa.
Hollingshead Co., R. M.	Camden, N. J.
Hopper, Inc., Edna Wallace	Chicago, Ill.
Houbigant, Inc.	New York, N. Y.
House of Tre-Jur, Inc.	New York City, N. Y.
Howard Drug & Medicine Co., The	Baltimore, Md.
Hoyt & Co., E. W.	Lowell, Mass.
Hudnut, Richard	New York City, N. Y.
Jergens Co., The Andrew	Cincinnati, Ohio
Joncaire, Inc., A.	Boston, Mass.
Kauffman-Lattimer Co., The	Columbus, Ohio
Kelly Co., Geo. A.	Pittsburgh, Pa.
Kentucky Alcohol Corporation	New York, N. Y.
Kitchen, Whitt & Co.	Ashland, Ky.
Koch Vegetable Tea Co., Dr.	Winona, Minn.
Frank Manufacturing Co., A. J.	St. Paul, Minn.
Lady Grey Co.	Chicago, Ill.
Lange Co., The	DePere, Wis.
Lazelle, Perfumer	Newburgh, New York
Lee Mfg. Co.	Chicago, Ill.
Leggett & Co., Francis H.	New York City, N. Y.
Lehn & Fink, Inc.	Bloomfield, N. J.
Lewis Bros., Inc.	New York City, N. Y.
Liebenthal Bros. Co., The	Cleveland, Ohio
Lilly & Co., Eli	Indianapolis, Indiana
Loewy Drug Co., Inc.	Baltimore, Md.
Loveland Co., Wm. H.	Binghamton, N. Y.
Lucky Tiger Remedy Co.	Kansas City, Mo.
Luxor, Ltd.	Chicago, Ill.
Maltbie Chemical Co., The	Newark, N. J.
Marinello Co., Inc.	New York, N. Y.
McBrady & Co., J. E.	Chicago, Ill.

[fol. 18]

McConon & Co.	Winona, Minn.
McCormick & Co.	Baltimore, Md.
McKesson & Robbins	Bridgeport, Conn.

Merrell Co., The Wm. S.	Cincinnati, Ohio
Merrill Drug Co., E. J.	Ironton, Ohio
Miller Co., Frank	Camden, New Jersey
Milson Co., The	Cincinnati, Ohio
Mulford Co., H. K.	Philadelphia, Pa.
Mulhens & Kropff, Inc.	New York City, N. Y.
Muth Bros. & Co.	Baltimore, Md.
Myers & Co., Inc., J. W.	Hagerstown, Md.
National Drug Co., The	Philadelphia, Pa.
Nelson, Baker & Co., The	Detroit, Mich.
Newton Products Co., The	Cincinnati, Ohio
Normany Products Co.	Los Angeles, Calif.
Norwich Pharmacal Co., The	Norwich, N. Y.
Nowland Co., Geo. H.	Cincinnati, Ohio
Oglivie Sisters	New York, N. Y.
Orr, Brown & Price Co., The	Columbus, Ohio
Ossola Bros., Inc.	Pittsburgh, Pa.
Owl Drug Co., The	San Francisco, Calif.
Palmer, Solon	New York City, N. Y.
Park & Sons Co., Ltd., John D.	Cincinnati, Ohio
Parke Co., L. R.	Philadelphia, Pa.
Parke, Davis & Co.	Detroit, Mich.
Parry Vegetable Compound Co.	Mansfield, Ohio
Peasles-Gaulbert Co.	Louisville, Ky.
Pa. Mfgrs. & Extract Co.	S. S. Pittsburgh, Pa.
Personeni, Inc., Joseph	New York City, N. Y.
Pinaud, Inc.	New York City, N. Y.
Pitman-Moore Co.	Indianapolis, Indiana
Pittsburgh Auto Equipment Co.	Pittsburgh, Pa.
Piver, Inc., L. T.	New York City, N. Y.
Plough Chemical Co., Inc., The	Memphis, Tenn.
Powers-Taylor Drug Co.	Richmond, Va.
Publicker Commercial Alcohol Co. of Delaware	Philadelphia, Pa.
Puritan Drug Mfg. Co.	Columbus, Ohio

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Raleigh Co., The W. T.	Freeport, Ill.
Rice, Lewis A.	Frederick, Md.
Roanoke Drug Co., Inc.	Roanoke, Va.
Roosa & Ratliff	Cincinnati, Ohio
Rorer, Inc., Wm. H.	Philadelphia, Pa.

Ross Independent Oil Co.	Washington, Pa.
Rossville Co., The	Lawrenceburg, Indiana
Royal Mfg. Co., of Duquesne, Inc.	Duquesne, Pa.
Sauer Co., C. F.	Richmond, Va.
Sayman Products Co., T. M.	St. Louis, Mo.
Schieffelin & Co.	New York City, N. Y.
Seeman Bros., Inc.	New York City, N. Y.
Severa Co., W. F.	Cedar Rapids, Iowa
Sharp & Dohme	Baltimore, Md.
Shipley-Massingham Co.	Pittsburgh, Pa.
Southern Chemical Co.	Petersburg, Va.
South Penn Oil Co.	Pittsburgh, Pa.
Spencer Perfume Co., Inc.	South Bend, Indiana
Sprague, Warner & Co.	Chicago, Ill.
Squibb & Sons, E. R.	New York City, N. Y.
Standard Pharmaceutical Corp.	Baltimore, Md.
Stansbury Drug Co., The	Middleport, Ohio
Stearns & Co., Frederick	Detroit, Mich.
Stewart Co., Jesse C.	Pittsburgh, Pa.
Stewart & Ward, Inc.	Bellaire, Ohio
Stras, Harman & Co., Inc.	North Tazewell, Va.
Strother Drug Co.	Lynchburg, Va.
Stuart & Co., C. H.	Newark, N. Y.
Stryon-Beggs Co., The	Newark, Ohio
Sweet Mfg. Co., Inc., The	Pittsburgh, Pa.
Thayer Pharmacal Co.	Chicago, Ill.
Thompson's Specialties, Inc., The	Springfield, Mass.
Thomson & Taylor Co.	Chicago, Ill.
Tornello & Co., C.	Youngstown, Ohio
Triner Co., Joseph	Chicago, Ill.
Tri-State Drug Co.	Uniontown, Pa.
United Drug Co.	Boston, Mass.
Upjohn Co., The	Kalamazoo, Mich.
Vadsco Sales Corp.	New York City, N. Y.
Vail Bros., Inc.	Philadelphia, Pa.
Vantine & Co., Inc., A. A.	New York City, N. Y.

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Virginia Dare Extract Co.	Brooklyn, New York
Vogler Drug Co., The Alfred	Cincinnati, Ohio
Wabash Baking Powder Co.	Wabash, Indiana

Warner & Co., Inc., Wm. R.	New York City, N. Y.
Watkins Co., The J. R.	Winona, Minn.
Westphal, Paul	New York City, N. Y.
Weyer, Geo. H.	Kansas City, Mo.
Whitmer Co., The H. C.	Columbus, Indiana
Wildroot Co., Inc., The	Buffalo, New York
Williams Co., The J. B.	Glastonbury, Conn.
Winarick, Ar.	New York City, N. Y.
Woodworth, Inc.	Rochester, New York
Wyeth & Bros., Inc., John	Philadelphia, Pa.
Yardley & Co., Inc.	New York, N. Y.
Yates Drug & Chemical Co.	New York, N. Y.
The Baltzly Company	Canton, Ohio
The Eugene Berninhaus Co.	Cincinnati, Ohio
Brown Barber Supply Co.	Steubenville, Ohio
Buckholz & Maus	Pittsburgh, Pa.
Cambridge Barber Supply	Cambridge, Ohio
Edlis Barbers Supply Co.	Pittsburgh, Pa.
P. W. Jackson Chemical Co.	Indianapolis, Indiana
J. Lang & Co.	Baltimore, Md.
Chas. J. Lynch	Portsmouth, Ohio
Mabsco Barbers Supply Co.	Pittsburgh, Pa.
Andrew Makrauer & Son, Inc.	Pittsburgh, Pa.
Mercer Barber Supply Co.	Sharon, Pa.
Nashville Barber Supply Co.	Nashville, Tenn.
Old Reliable Hannan Supply Corp.	Cincinnati, Ohio
Pabst & Kohler	Columbus, Ohio
Pennsylvania Perfumery & Barber Supplies	Pittsburgh, Pa.

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H. L. Purnell Co.	Salisbury, Md.
A. Reeves Barber Supply Co.	Richmond, Virginia
Semones-Hunt Co.	Knoxville, Tenn.
Southern Barber Supply Co.	Roanoke, Virginia
Dorn, John G.	Sandusky, Ohio
Engels & Krudwig Co., The	Sandusky, Ohio
Hammer Co., The A. J., Agent for Beaulieu Vineyards Co.	Cleveland, Ohio
Stetter, Fred. M., Agent for Beaulieu Vineyard, Inc.	Cincinnati, Ohio

American Oil Co., The	Baltimore, Md.
Begg, Sons & Co., C. W.	Chicago, Ill.
Bourjois, Inc.	New York, N. Y.
Calvert Drug Co., The	Baltimore, Md.
Cole Chemical Co.	St. Louis, Mo.
Kalerd Laboratories, Inc.	Pittsburgh, Pa.
Knapp Extract Co.	Cleveland, Ohio
Lamont, Corliss & Co.	New York City, N. Y.
Mutual Drug Co., The	Pittsburgh, Pa.
Quaker Maid, Inc., The	New York, N. Y.
Pitkin & Co., J. M.	Newark, N. J.
Reid, Murdoch & Co.	Chicago, Ill.
Richter & Co., Inc., F. Ad.	Brooklyn, N. Y.
Sausage Mfg. Co.	Pittsburgh, Pa.
Schindel, Rohrer & Co., Inc.	Hagerstown, Md.
Sea Breeze Laboratories, Inc.	Pittsburgh, Pa.
Smith-Higgins Co., Inc.	Johnson City, Tenn.
Southern Grocery Co., Inc.	Roanoke, Virginia
Southern Sales Co.	Bristol, Tenn.
Stellar Drug Co., Inc.	New York, N. Y.
Tru-Lax Products Co.	Newark, N. J.
Walsh & Co., J. A.	Pittsburgh, Pa.
Wuppermann Angostura Bitters Agency, Inc., J. W.	New York, N. Y.
Canton-Akron Barber Supply Co.	Canton, Ohio

[fol. 22] PLAINTIFFS' EXHIBIT "C" TO BILL OF COMPLAINT

S. P. C. No. 1-A

STATE OF WEST VIRGINIA:

Prohibition Department

Ruling Number Five

Effective January 1, 1931

Class "A": Alcoholic Preparations Listed As "Liquors", The Sale of Which is Prohibited in This State.

The following, on account of the general abuse of the preparations or liability to abuse, are classed as beverages, and their sale forbidden.

Jamaica Ginger or Tincture of Ginger in whatever form; Tinctures of Orange Peel and Lemon Peel; Extracts of Sweet Anise and Juniper, Elixir Grippo, Lyko, "Old Monticello Tonic", Veenotonic, Unapproved Bitter Wines, Bateman's Drops, Godfrey's Cordial, Blackberry Cordial, all Rubbing Alcohols not specifically approved, Malt Extracts and all similar preparations for making malt beverages. Imitation Extracts of Blackberry, Pear, Apple, Grape, Rum, Brandy, etc. Abbott's Bitters, Egon Braun Amargo Bitters, Litthauer Bitters, Todds Tonic, Resault Wine Tonic, Chateau Vinay Wine Tonic, Ner-Bo-Ton, Malt Tonics and Cider containing more than ½ of 1 per cent of alcohol by volume, and all like preparations used as intoxicating beverages. The two following classes comprise articles having a recognized legitimate use, and are authorized by permit to be sold for such use:

Class "B": Sold By The Drug Trade Only Under Permit. (Samples Must Have Been Submitted For Approval Before Distributors Shall Offer For Sale.)

[fol. 23] Pure Grain Alcohol, Alcohol medicated according to Federal Formulae, Approved Rubbing Alcohols, which are sold under certificate by Registered Pharmacist or under his supervision and signed by him and the customer. Wine for sacramental purposes, lightning Hot Drops, Paregoric, Tincture Virburnum, Wheatamin, Whitlock's Kidney Medicine, Sweet Spirits of Nitre and Aromatic Spirits of Ammonia in bulk, approved Canned Heat (so-called), Holko Tonic, Angostura Bitters, Cintora, Peptone, Tonk-a-Vin, all metallic and organic derivatives of Barbaturic Acid physiologically classed as hypnotics, approved Beef Tonics containing 30 per cent solid matter in solution, Bay Rum and Bay Rum Compounds, Hair Tonics and Lotions containing 15 per cent of alcohol by volume, and all tonics, Cordials and Elixirs having 15 per cent or over by volume.

All Bay Rum and Bay Rum Compounds must contain as a denaturant one-fourth grain of Potassium Antimony Tartrate (Tartar Emetic) and must be sold to the ultimate consumer in quantities not exceeding eight fluid ounces.

Class "C": May Be Sold By All Dealers Under Permit. (Samples Must Have Been Submitted For Approval Before Distributors Shall Offer For Sale.)

1. Patent And Proprietary Medicines of recognized merit but liable to misuse as intoxicants by addicts; all brands of approved Italian Fernets, Sweet Spirits of Nitre and Aromatic Spirits of Ammonia each in not to exceed 1 ounce bottles to ultimate consumer.

2. Tonics And Cordials: All Tonics and Cordials less than 15 per cent of alcohol by volume.

3. Toilet Waters and Perfumes: All Toilet Waters and Perfumes approved by the Commissioner as sufficiently denatured or medicated to prevent use as intoxicants.

4. Hair Tonics and Lotions: All Hair Tonics and Lotions containing less than 15 per cent of alcohol by volume which have been approved by the Commissioner.

[fol. 24] 5. Extracts and Flavors: Pure Orange, Lemon and Vanilla containing 40 per cent and over of alcohol by volume, Imitation Extracts and Flavors containing 15 per cent or over of alcohol by volume. All extracts, required to be sold under permit, to be sold in not to exceed two-ounce bottles, to ultimate consumers.

6. Denatured Alcohol, Also All Anti-Freeze Compounds Containing 10 Per Cent Or Over Of Alcohol By Volume: Used for scientific and mechanical purposes, except the rubbing or bathing alcohols and medications under Federal Formulae sold only by druggists.

Class "D": May Be Sold By All Dealers Without Permit. (Samples Must Have Been Submitted For Approval Before Distributors Shall Offer For Sale.)

Drugs and medicines with alcoholic content, but so fully medicated that they cannot be used as intoxicants. Illustrating this class are such articles as Spirits of Camphor, Tincture of Iron, Tincture of Iodine, Castoria, Shoe Polishes, Insecticides, etc. Long used patent and proprietary medicines, free from objections as being employed as intoxicants by addicts, fall in this class.

Important—Read Carefully

1. The foregoing classification is not a complete or final one, but fairly illustrates the four groups or classes into which the various alcoholic preparations defined as

"liquors" by Section 1, Article 1, of the Prohibition Law are placed.

2. Bay Rum, Hair Tonics and Toilet Waters are often used as intoxicants by addicts. Permits do not protect sales for illegal use and such sales are made at the peril of the dealer. In such cases permits will be revoked and prosecutions entered under Section 4, Article 1, of the Prohibition Law.

[fol. 25] 3. Alcoholic preparations barred from sale in this State on account of their use as intoxicants, may, when formula can be modified so as to remove this objection, be admitted to sale under permit.

4. New alcoholic preparations should be submitted to the Department for analysis and classification before being offered for sale by distributors.

5. In passing upon and classifying these alcoholic mixtures and preparations the Commissioner gives full hearings to all parties interested, analysis is made by a competent chemist, and the advice and assistance of the Health Department and the Board of Pharmacy is given in many instances.

6. Barbers may purchase from retail and wholesale dealers holding permits Hair Tonics and Toilet Waters, for use in chair only, and are not required to take out permits. No retail dealer's permit will be issued to barbers.

7. "Class A" comprehends "liquors" in the same legal sense as whiskey, wine or beer, and comes within the inhibition of Sections 4 and 9, Article 1, of the Prohibition Law.

8. "Class B" and "Class C" include preparations sold only under permit as specified above.

9. "Class D" illustrates preparations that require no permit for their sale.

10. This ruling is subject to revision from time to time, as made necessary by actual test and experience.

W. G. Brown, State Commissioner of Prohibition.

Charleston, W. Va., September 30, 1930.

[fol. 26] IN UNITED STATES DISTRICT COURT

JOINT ANSWER OF W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, AND HOWARD B. LEE, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, DEFENDANTS, TO THE BILL OF COMPLAINT HEREIN—Filed January 12, 1931

For answer to the bill of complaint in the above entitled cause defendants above named say:

I

Answering the first paragraph of the bill defendants admit that plaintiffs are wholesale dealers in commercial products containing as a necessary solvent or preservative ethyl alcohol, and that said products are manufactured and sold under permits issued by the United States Bureau of Industrial Alcohol and approved by the United States Bureau of Prohibition; that defendant W. G. Brown is State Commissioner of Prohibition of the State of West Virginia, and defendant Howard B. Lee is Attorney General of said State as alleged in plaintiff's bill; and that the said defendants are residents of the Southern District of West Virginia. But defendants deny the allegation in said paragraph that said products "are used and usable exclusively for medicinal, mechanical, toilet and culinary purposes" and deny the allegation that "none of which products are intoxicating liquors".

II

Answering the second paragraph of said bill defendants admit the allegation in sub-paragraph "(1)", but specifically deny the allegations in sub-paragraphs "(2)" and "(3)" of said second paragraph.

III

Answering the third paragraph of the bill defendants say they have no knowledge of the time plaintiff McCor-[fol. 27] mick & Co., Inc., has operated its plant, nor of the place of its operations, nor of the extent and scope of its activities, the per cent of its alcoholic products sold and the volume of its business in the State of West Virginia.

Defendants admit that under the provisions of the National Prohibition Act said plaintiff, McCormick & Co., Inc., in order to manufacture, transport and sell said products containing ethyl alcohol, is required to have issued to it a permit authorizing it to manufacture, transport and sell such products for use for medicinal, mechanical, toilet and culinary purposes; and defendants also admit that this plaintiff and all manufacturers likewise engaged in the production of such commodities containing ethyl alcohol, on whose behalf this suit is brought, are holders of permits under the National Prohibition Act; but defendants deny that such Federal permits give to said plaintiffs the right to transport and sell said products classified as "liquors" under Section 1, Article 1 of Chapter 60 of the Official Code of West Virginia into said state through interstate commerce; and deny that such Federal permits authorize or give the right to the said plaintiffs to engage in the business of selling and shipping same through interstate commerce to dealers in West Virginia who hold permits from the State Commissioner of Prohibition; but defendants deny the allegation in said paragraph that the alcoholic products offered for sale in the State of West Virginia by plaintiffs and all others on whose behalf their suit is brought, and for which the said State requires a permit under its laws, are "non-intoxicating in fact".

IV

Answering the fourth paragraph of the bill defendants admit that the first three sentences of said paragraph correctly state the laws, in so far as set out, in respect to the manufacture, sale, keeping or storing for sale, purchase and transportation of liquors in this state; but deny that Defendant W. G. Brown, "purporting to act as Commissioner of Prohibition" has promulgated certain regulations as in said bill alleged; that said Commissioner has published a list of permit holders as therein stated and has stated that it is his intention to confiscate and destroy [fol. 28] "all products purchased from dealers who do not hold permits as aforesaid, and that all persons selling such products or keeping or storing the same for sale will be prosecuted under the laws of the State of West Virginia; which threatened action on the part of said Com-

missioner would result in the disorganization and destruction of a large part of plaintiffs' business, the loss of many of their customers and the depreciation, if not destruction, of their good will and property, all to the irreparable damage of the plaintiffs and their stockholders". On the contrary defendants say that the said defendant, Brown, pursuant to the laws of the State of West Virginia, and more especially under and by virtue of Section 3, Article 2 of Chapter 60 of the Official Code of West Virginia, which provides that, "The manufacture of alcohol, wine and other liquors, and the sale of the same by the manufacturer, by wholesale druggist and other dealers shall be under the supervision of the Commissioner and under such rules and regulations as he may from time to time prescribe", and the further provisions of Sections 1, 4, 5, 9, 11, and 13 of Article 1 of said Chapter 60, has, in good faith, in conformity with the laws of West Virginia and of the laws of the United States, promulgated certain rules and regulations for the sale of liquors in this state. A true copy of said Rules and Regulations is here filed, as part hereof, marked "Defendants' Exhibit No. 1".

And defendants deny that said rules and regulations are unlawful, and deny that these regulations have deprived or will deprive plaintiffs of any rights, privileges and immunities secured to them by the constitution of the United States, to-wit, the right to ship and transport their said products in interstate commerce.

And defendants deny the charge that the action of the said defendant, Brown, in promulgating the said rules and regulations would result in the disorganization and destruction of any lawful business, or the loss of any lawful customers, or the depreciation and destruction of their good will and property employed in lawful business, and of irreparable damage of the plaintiffs and their stockholders engaged and employed in accordance with the laws of this state and of the United States.

[fol. 29]

V

Answering the fifth paragraph of the bill, defendants deny that the products containing ethyl alcohol which plaintiffs desire to sell are approved and legitimate articles of sale and commerce and proper to be transported into the

State of West Virginia solely by interstate commerce, but aver that many of the said products are "liquors" as defined by the laws of the State of West Virginia, and can only be sold and transported into said State in accordance with its laws, and by permit issued from the State Commissioner of Prohibition under the rules and regulations prescribed by him pursuant to said laws. Defendants further deny the allegation of plaintiffs that they are engaged in a lawful business under the laws of the United States and the State of West Virginia, and that the sales of all of said products as desired by them, without first obtaining permits for such sales, as required by the laws of the said state and the rules and regulations prescribed thereunder by the said Commissioner "are lawful transactions and constitute transactions in interstate commerce"; and deny that the demand of the Defendant Brown, in his capacity of Commissioner of Prohibition, is an unlawful attempt to hinder, obstruct and restrain the interstate commerce and business in which these plaintiffs, and those for whose benefit this suit is brought, are engaged. Defendants deny the charge that said Commissioner of Prohibition is utterly without right or authority to require a permit to be issued to the plaintiffs, or to any of the parties represented by them, for carrying on said business, and to require the payment of a permit fee therefor.

Defendants aver that it is the duty of said plaintiffs in compliance with the laws of the State of West Virginia to first secure the permits required thereunder before attempting to transport and sell said products in said State through interstate commerce; that — is the duty of said W. G. Brown, as such Commissioner, to require plaintiffs to so procure such permits; and that it is — duty of the sa-d Howard B. Lee, as such Attorney General, to prosecute plaintiffs for failure and refusal on their part to procure [fol. 30] such permits and pay such fees as are required by the laws of said State.

And defendants deny each and every allegation in the said bill, not herein admitted, controverted or specifically denied.

Wherefore defendants deny that the said plaintiffs are entitled to the relief, or any part thereof, in the said bill of complaint demanded, or any relief whatever, and pray

to be hence dismissed with their reasonable charges in this behalf wrongfully sustained.

Dated January —, 1931.

H. B. Lee, Attorney General; R. Dennis Steed, Assistant Attorney General; W. G. Brown, Solicitors for Defendants.

Duly sworn to by W. G. Brown. Jurat omitted in printing.

[fol. 31] DEFENDANTS' EXHIBIT NO. 1 TO ANSWER

WEST VIRGINIA:

Rules and Regulations prescribed by the State Commissioner of Prohibition for the sale of ethyl alcohol, wine and alcoholic preparations, defined as liquors in Section 1, as provided by Sections 4 and 24 of Chapter 32-A of the Code of West Virginia, as amended by the acts of one thousand nine hundred and twenty-three.

January 1, 1927

First—Manufacturers

(1) A manufacturer of liquors within the meaning of these rules and regulations is a person, company or corporation, a resident of West Virginia, engaged in the business of distillation, denaturation or medication of ethyl alcohol, or the making of wines as permitted and supervised by the Federal Government; or the compounding and manufacturing of medicinal preparations, patent medicines, toilet and antiseptic mixtures, flavoring extracts, pharmaceuticals, etc., in which alcohol, wine or other alcoholic solution is an essential ingredient, and which said preparations, mixtures, and compounds are intoxicating and susceptible of use as beverages; (2) and which said person, company or corporation, in good faith, engages in such business and not for the purpose of evading the prohibition laws of the State, or aiding or abetting others in violating the same by any scheme or device whatsoever. (3) Non-resident manufacturers doing business in this State are classed and treated as wholesale dealers under these rules and regula-

tions. (4) Any resident manufacturer who has made application in writing on the proper form to the State Commissioner of Prohibition, and has paid the fee required by law, and received from said Commissioner a written permit so to do, may manufacture such liquors as above defined and set out, and may sell the same at wholesale for pharmaceutical, medicinal, scientific and mechanical purposes only, to those having the right under the law to purchase and [fol. 32] who hold permits to purchase same duly issued by the State Commissioner of Prohibition.

Second—Wholesale Druggist

(1) A wholesale druggist within the meaning of these rules and regulations is one whose business is that of generally selling drugs, pharmaceuticals, ethyl alcohol, wine and all alcoholic preparations defined as liquors in Section 1, at wholesale to retail druggists, manufacturers of medicines and pharmaceuticals, physicians, dentists and veterinarians, etc.; (2) same as manufacturer. (3) Any such wholesale druggists, after obtaining a permit from the State Commissioner as in (4) under Manufacturer, may sell to retail druggists, pure grain alcohol for medicinal, pharmaceutical, mechanical or scientific purposes; and such alcohol to physicians, dentists and veterinarians for use in the practice of their professions only and not for re-sale, and who shall have been granted permits by the State Commissioner of Prohibition to purchase the same; and may also sell wine for sacramental purposes by religious bodies, as well as such other alcoholic mixtures and preparations as the law and the latest Prohibition Department Ruling permits, by complying with the rules and regulations prescribed by the State Commissioner of Prohibition. (4) Any such wholesale druggist residing in this State may purchase and use in the manufacture of medicinal preparations and compounds, sherry wine in quantities not exceeding twenty-five wine gallons during any period of ninety days, by complying with the rules and regulations of said Commissioner after having been duly issued a permit in writing authorizing such purchase and use.

Third—Wholesale Dealer

(1) A wholesale dealer within the meaning of these rules and regulations is a person, company, or corporation whose

business is that of selling at wholesale ethyl alcohol in any form, whether pure, medicated or denatured, and wine as permitted and supervised by the Federal Government; or selling as aforesaid any liquid, mixture, or preparation, whether patented or not which will produce intoxication, or coming within the definition of "liquors" in Section 1; (2) [fol. 33] same as manufacturer. (3) Any such wholesale dealer, after obtaining a written permit from the State Commissioner of Prohibition as in (4) under Manufacturer, may sell such liquors as above defined and set out, at wholesale, for medicinal, pharmaceutical, scientific and mechanical purposes to any person, company or corporation who holds a permit from said commissioner to purchase the same.

Fourth—Retail Druggist

(1) A retail druggist within the meaning of these rules and regulations is a person, firm or corporation who generally sells drugs and pharmaceuticals at retail, and who is registered as a pharmacist, or who employs a registered pharmacist, and who has received from the proper authorities of his County permission and license as required by law to carry on the business of retail druggist; and (2) who conducts such business in good faith and according to law and not for the purpose of selling intoxicating liquors of any kind in violation of law.

Fifth—Retail Dealer

(1) A retail dealer within the meaning of these rules and regulations is a person, firm or corporation whose business is that in which the sale of alcoholic preparations coming under the definition of "liquors" in Section 1 is incidental an- auxiliary to the line of business carried on by said dealer; (2) same as (2) under Retail Druggist. (3) Examples of retail dealers are general merchandise stores, grocers, garages, automobile service stations, confectionery stores, traveling or itinerant salesmen, barbers, etc. (4) Same as (2) under Manufacturer. (5) All retail dealers desiring to purchase at wholesale and sell at retail alcoholic preparations having made application in writing on the proper form and paid the fee as required by law and obtained a permit from the Commissioner so to do may sell at retail to consumers preparations coming under class "C" of Prohibition Department Ruling.

[fol. 34] Sixth—Retail Barber Supply Dealers

(1) A retail barber supply dealer within the meaning of these rules and regulations is a person, company or corporation whose business is that of generally selling alcoholic preparations, which are generally used by barbers in the practice of their profession, to barbers and barber shops, and who operate in conformity to the following conditions: (a) Shipments of any particular toilet or antiseptic preparation containing alcohol must not exceed five gallons to any customer in any month, except that Shampoos containing alcohol and Witch Hazel low in alcoholic content are not included in this regulation, and Supply Dealers must report immediately all sales to the amount of three gallons or over of Bay Rum, Quinine Hair Tonic or Lilacs. (b) Sales must be made only to permit holders in this State and no barber is permitted to rebottle and sell any alcoholic preparation, but sales to his customers shall be in the original package. Supply dealers are required to observe this regulation, and make confidential reports of same to the Department. (c) All Supply dealers selling in excess of the quantity fixed in paragraph (a) and not in accordance with this regulation, will be classed as Wholesale Dealers and required to pay a fee of $50.00 for permit; and all Supply Dealers complying with this regulation will be classed as Retail Dealers and required to pay a fee of $2.00 for permit. (d) Barbers buying at retail for use in their chairs only and not for resale are not required to take out permits. (e) Retail Barber Supply Dealers residing in this State are authorized to purchase alcoholic preparations from Manufacturers and Wholesale Dealers holding a West Virginia State permit. (f) No resident retail barber supply dealer is permitted to rebottle and sell any alcoholic preparation, but sales to his customers shall be in the original package. (g) A Retail Barber Supply Dealer desiring to rebottle and sell alcoholic preparations shall be classed as a Manufacturer and required to obtain a Manufacturer's or Wholesale Dealer's permit in writing from the Commissioner so to do. (h) It is stipulated by the applicant that in consideration of the receipt of a Retail Dealer's permit for the sale of alcoholic preparations to the Barber trade of West Virginia strict compliance with said regulations is the con-

[fol. 35] dition on which said permit is issued, and a failure

to comply therewith shall be considered sufficient cause for the withdrawal of said permit.

Seventh—Reports by Manufacturers, Wholesale Druggists, and Wholesale Dealers

(1) When such information becomes necessary in connection with the enforcement of the prohibition law, the right is reserved by the Commissioner of Prohibition to require such manufacturer, wholesale dealer, or wholesale druggist who has received such permit as aforesaid to furnish him with a complete report of sales, of any or all alcoholic preparations, made, which report shall be made in conformity to the same form of report (S. P. C. No. 9) as furnished by the Commissioner; and such report shall be sworn to by the owner, manager or party actually in charge. As to reports each manufacturer, wholesale dealer, or wholesale druggist is handled separately and not as a group by the Commissioner. (2) However, all manufacturers, wholesale druggists, and wholesale dealers shall make a complete report, until further notice, upon all sales in West Virginia of the following preparations: (a) ethyl alcohol, whether pure grain, medicated or denatured; (b) all rubbing alcohols; (c) Sweet Spirits of Nitre, in bulk, that is in exceeding one-ounce containers; (d) extracts to restaurants, hotels, boarding houses, candy makers, ice cream manufacturers, etc., in bulk, that is in exceeding two-ounce containers; (e) and Sterno Canned Heat. (3) All manufacturers, wholesale dealers or wholesale druggists, not making a complete monthly report to the Commissioner of Prohibition, must keep their records so that the Commissioner may obtain the quantity of any or all alcoholic preparations sold to any dealer during any given period of time. Such records should in all cases contain the West Virginia State Permit number of the dealer to whom such sales were made. (4) All Manufacturers, wholesale druggists and wholesale dealers shall make such special reports to the Commissioner of Prohibition when requested by him. (5) Reports as required by the Commissioner should be made not later than the tenth day of each month for the month preceding.

[fol. 36]

Eighth

The Commissioner of Prohibition hereby reserves the right to notify such wholesale druggist, dealer, or manu-

facturer not to sell alcohol, wine or other liquors to any retail druggist, manufacturer of medicines and pharmaceuticals, physicians, dentist or veterinarian, etc., who he has reason to believe is violating the law; or to give such notice, for any other reasons to the Commissioner of Prohibition deemed proper; and upon notice as aforesaid to such wholesale druggist, dealer or manufacturer, in writing he shall at once discontinue selling to such retail druggist, or other purchaser and a sale made to such retail druggist, or other purchaser after such notice is given, shall be deemed a sale made contrary to law.

Ninth

The Commissioner of Prohibition reserves the right to revoke or suspend any permit granted to any dealer or druggist whom he has reason to believe is selling contrary to the rules herein named, or in violation of the law regulating the sale of intoxicating liquors; and a sale of alcohol or any alcoholic preparations coming within the purview of liquors as defined in Section 1, made by such dealer or druggist after such permit is revoked shall be deemed a sale made contrary to law.

Tenth

Alcoholic preparations offered for sale in this State for external use must be so denatured as to render them unfit for beverage purposes and non-potable. All liquids, mixtures and preparations containing so much as one-half of one per cent of alcohol and not specifically excepted under Section 4 will be treated as "liquors" within the definition of Section 1, until they are shown to be sufficiently denatured or medicated as to be non-potable. When this is shown to the satisfaction of the Commissioner any such preparation for external use only may be sold by manufacturers or through wholesale druggists holding permits in this State provided always that the sale is made to druggists and that [fol. 37] all druggists making sale to the consumer stamp each bottle or package sold with the West Virginia Prohibition Department label.

Eleventh

With the advice and approval of a committee of the West Virginia Pharmaceutical Association, a label has been de-

vised of the usual form and size, with the following words in red ink printed on white paper, followed by the name and address of the druggist.

West Virginia

Prohibition Department

Label

Caution

For External Use Only

This preparation is so denatured as to render it especially adapted for bathing and massage. Absolutely unfit for internal use. Serious conditions will result from its infernal administration.

(Name and Address of Druggist)

To be placed on all alcoholic liquids and preparations excepted from the provisions of section 1 of Chapter 32A and section 4 of said chapter and passed by the Commissioner as non-beverage preparations. This label which is furnished by the druggist, must be affixed to each bottle or package sold by the retail druggist to the consumer, and a copy of the label filed with the Commissioner.

Twelfth

Applications for permits to manufacture, sell or purchase alcohol, wine, and alcoholic preparations defined as [fol. 38] "liquors" in Section 1, must be made upon forms furnished by the Commissioner, and in filling out such applications no alterations or erasures of the printed form should be made. The affidavit must be subscribed by the applicant in person, or in case of a corporation, by a duly authorized official, and if fee is required, same must accompany the application. All applications for permit should be sworn to before a Notary Public or other person having authority under the law of administering oaths.

Thirteenth—Fees Collected

Fees are collected in full for the calendar year (the law makes no provision for collecting of fractional fees) as fol-

lows for West Virginia State permits for the manufacture, purchase, sale and use of "liquors", and use of Still:

Manufacturers, wholesale dealers and wholesale druggists	$50.00
Users of alcohol or alcoholic preparations in wholesale quantities	10.00
Registration of Stills (druggists excepted from paying fee)	5.00
Retail Dealers	2.00

Fourteenth

The latest Prohibition Department Ruling, which is published separate from these rules and regulations, is made a part of these rules and regulations, and should be carefully studied and followed.

Fifteenth—Physicians

(1) Regular practicing physicians duly licensed to practice medicine in this State and desiring to obtain alcohol or alcoholic preparations for use in the practice of their profession, and not for re-sale, may obtain a permit without fee from the Commissioner so to do. (2) Physicians using in excess of five gallons of alcohol during the calendar year [fol. 39] must take out User's Permit and pay the fee of $10.00 as required by law.

Sixteenth—Dentists and Veterinarians

Regular practicing dentists and veterinarians are treated same as physicians under these rules and regulations, except the amount of alcohol is two gallons for the calendar year instead of five.

Seventeenth—Transfer of Permits

West Virginia State permits shall not be transferred from persons, companies or corporations holding same, to another, but the same may be transferred from one address to another by returning to the Commissioner the permit to be transferred with the request in writing that it is desired that said permit be corrected so as to contain the new location of the holder.

Eighteenth

All resident permit holders should give the number of their West Virginia State permit in ordering alcohol or alcoholic preparations.

Nineteenth

The holders of permits shall keep their places of business and stocks open to inspection at all times by Federal, State, County and Municipal officers having authority to enforce the prohibition laws.

Twentieth

These Rules and Reguations are subject to change at such time the Commissioner may deem necessary and without notice.

(And on another day, to-wit, at a District Court of the United States for the Southern District of West Virginia, at Charleston, in said District, on January 17, 1931.)

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF SUBMISSION—Oct. 26, 1931

This cause came on for hearing before a statutory Court of three judges, duly convened by the Honorable George W. McClintic, United States Judge for the Southern District of West Virginia, by calling to his assistance the Honorable Elliott Northcott, Judge of the Circuit Court of Appeals for the Fourth Circuit, and the Honorable William E. Baker, Judge of the District Court of the United States for the Northern District of West Virginia, pursuant to section 266 of the Judicial Code, upon the application of McCormick & Co., Inc., a corporation, and Durham Bros., Co., Inc., a corporation, plaintiffs in the above entitled cause, for an interlocutory injunction, pursuant to plaintiff's bill of complaint, praying an interlocutory and final decree enjoining and restraining the enforcement by the defendant W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and the defendant

Howard B. Lee, Attorney General of the State of West Virginia, of certain rules, orders and regulations published and made by the said State Commissioner of Prohibition of the State of West Virginia, under the terms and provisions of which the plaintiffs and those on whose behalf they sue are required to secure from the said State Commissioner of Prohibition permits and pay therefor an annual fee of Fifty Dollars, before they are allowed to sell and ship their products in interstate commerce to licensed dealers in West Virginia, on the ground that said rules and regulations of the State Commissioner of Prohibition [fol. 41] violate the interstate commerce clause of the United States Constitution.

And it appearing to this court that notice of plaintiffs' application for the interlocutory injunction prayed for herein, has been served upon and accepted by the defendants W. G. Brown, State Prohibition Commissioner of West Virginia, and Howard B. Lee, Attorney General of West Virginia, and that such notice has been served upon and accepted by Wm. G. Conley, Governor of West Virginia, which notice and the acceptance thereof by the persons hereinabove set out, is ordered to be filed herein, and the defendants W. G. Brown, State Commissioner of Prohibition, and Howard B. Lee, Attorney General of West Virginia, appeared in open court, either in person or by counsel, and acknowledged the sufficiency of said notice and service upon said defendants, and the Attorney General of West Virginia pursuant to authority duly given to him by Wm. G. Conley, Governor of West Virginia, appeared in open court and on behalf of the said Wm. G. Conley, as Governor of West Virginia, did also acknowledge the sufficiency of said notice and service thereof upon the said Wm. G. Conley, as Governor of West Virginia.

Thereupon, the court, upon consideration of plaintiffs' verified bill of complaint and exhibits filed therewith, and the verified answer of the defendants and exhibits filed herewith, and the general replication to said answer, and the affidavits of James M. Doran, G. F. Beyer, John W. Herscher, Robert B. Lewis, Ray Yancey, John Glassford, Willoughby N. McCormick and T. A. Borradaile, which affidavits are hereby ordered to be filed, and the arguments of counsel, takes time to consider.

(The affidavits of James M. Doran et als., referred to in the foregoing order, are in the words and figures as follows:

[fol. 42] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JAMES M. DORAN—Filed Oct. 26, 1931

DISTRICT OF COLUMBIA,
City of Washington, ss:

On this 19th day of December, 1930, personally appeared before me, James M. Doran, who, being sworn in due form of law, did depose and say:

First. That he is the Commissioner of Industrial Alcohol of United States Treasury Department.

Second. That the records of the Bureau show that the following named firms and corporations have qualified as permittees to secure and use commercial alcohol for the purpose of using the said alcohol in the manufacture of articles for non-beverage use:

Abbott Laboratories, North Chicago, Illinois.
The Abner Royce Co., Cleveland, Ohio.
Allied Drug Products Co., Chattanooga, Tennessee.
American Druggists Syndicate, Long Island City, N. Y.
Arden, Elizabeth, New York City, N. Y.
Bailey & Son, James, Baltimore, Maryland.
Baltimore Drug Co., The, Baltimore, Maryland.
Blackstone Manufacturing Co., Newark, N. J.
Baltzly Co., The, Canton, Ohio.
Berninghaus Co., The Eugene, Cincinnati, Ohio.
Brown Barber Supply Co., Steubenville, Ohio.
Buckholz & Maus, Pittsburgh, Pa.
Cambridge Barber Supply, Cambridge, Ohio.
Edlis Barber's Supply Co., Pittsburgh, Pa.
Jackson Chemical Co., P. W., Indianapolis, Ind.
Lang & Co., J., Baltimore, Maryland.
Lynch, Chas., J., Portsmouth, Ohio.
Mabsco Barber Supply Co., Pittsburgh, Pa.
Puritan Drug Mfg. Co., Columbus, Ohio.

Marinello Co., Inc., New York City.
Stearns & Co., Frederick, Detroit, Michigan.
Strother Drug Co., Lynchburg, Virginia.
Ayer, Inc., Harriet Hubbard, New York City, N. Y.
Canton-Akron Barber Supply Co., Canton, Ohio.
Southern Grocery Co., Inc., Roanoke, Va.
Koch Vegetable Tea Co., Dr., Winona, Minn.
Lady Grey Co., Chicago, Ill.
Lange Co., De Pere, Wis.
Lazelle, Perfumer, Newburgh, N. Y.
Leggett & Co., Francis H., New York City, N. Y.
Lehn & Fink, Inc., Bloomfield, N. J.
Liebenthal Bros. Co., The, Cleveland, Ohio.
Lilly & Co., Eli, Indianapolis, Indiana.
Loewy Drug Co., Inc., Baltimore, Md.
Loveland Co., Wm. H., Binghamton, N. Y.
Lucky Tiger Remedy Co., Kansas City, Mo.
Maltbie Chemical Co., The, Newark, N. J.
[fol. 43] McConnon & Co., Winona, Minn.
McCormick & Co., Baltimore, Md.
McKesson & Robbins, Bridgeport, Conn.
Merrell Co., The Wm. S., Cincinnati, Ohio.
Merrill Drug Co., E. J., Ironton, Ohio.
Milson Co., The, Cincinnati, Ohio.
Mulford Co., H. K., Philadelphia, Pa.
Muth Bros. & Co., Baltimore, Md.
National Drug Co., The, Philadelphia, Pa.
Nelson, Baker & Co., Detroit, Michigan.
Norwich Pharmacal Co., The, Norwich, N. Y.
Ogilvie Sisters, New York City, N. Y.
Orr, Brown & Price Co., The, Columbus, Ohio.
Owl Drug Co., The, San Francisco, California.
Park & Sons Co., Ltd., John D., Cincinnati, Ohio.
Parke, Davis & Co., Detroit, Michigan.
Parry Vegetable Compound Co., Mansfield, Ohio.
Pa. Manufacturers & Extract Co., S. S., Pittsburgh, Pa.
Personeni, Inc., Joseph, New York City, N. Y.
Pinaud, Inc., New York City, N. Y.
Pitman-Moore Co., Indianapolis, Indiana.
Plough Chemical Co., Inc., The, Memphis, Tenn.
Powers-Taylor Drug Co., Richmond, Virginia.
Rawleigh Co., The W. T. Freeport, Illinois.
Roanoke Drug Co., Inc., Roanoke, Virginia.

Roosa & Ratliff, Cincinnati, Ohio.
Royal Mfg. Co., of Duquesne, Inc., Duquesne, Pa.
Sauer Co., C. F., Richmond, Virginia.
Sayman Products Co., T. M., St. Louis, Mo.
Schieffelin & Co., New York City, N. Y.
Seeman Bros., Inc., New York City, N. Y.
Selig Company, The, Atlanta, Ga.
Severa Co., W. F., Cedar Rapids, Iowa.
Sharp & Dohme, Baltimore, Md.
Shipley-Massingham Co., Pittsburgh, Pa.
Southern Chemical Co., Petersburg, Virginia.
Sprague, Warner & Co., Chicago, Illinois.
Squibb & Sons, E. R., New York City, N. Y.
Standard Pharmaceutical Corp., Baltimore, Md.
Stansbury Drug Co., The, Middleport, Ohio.
Lewis-Bros., Inc., New York City.
The Newton Products Co., Cincinnati, Ohio.
Yowland Co., Geo. H., Cincinnati, Ohio.
[fol. 44] Park & Son Co., Ltd., T. H., Cincinnati, Ohio.
Rice, Lewis A., Frederick, Md.
Spencer Perfume Co., Inc., South Bend, Ind.
Vantine Co., A. A., New York City.
Wabash Baking Powder Co., Wabash, Ind.
Whitmer Co., H. C., Columbus, Ind.
Woodworth, Inc., Rochester, N. Y.
Yardley & Co., Inc., New York City.
Yates Drug & Chemical Co., New York City.
F. Ad. Richter Co., Brooklyn, N. Y.
Blair Labofatories, Dr., Lynchburg, Virginia.
Budeker Drug Co., Richmond, Virginia.
Boneilla Laboratories, Inc., Indianapolis, Indiana.
Bowman Bros. Drug Co., The, Canton, Ohio.
Boyer Chemical Laboratory, Inc., The, Chicago, Illinois.
Brewer & Co., Inc., Worcester, Massachusetts.
Brooks Co., Inc., The, Attica, N. Y.
Burnett Co., Joseph, Boston, Mass.
California Perfume Co., New York City, N. Y.
Carlova, Inc., Binghamton, New York.
Carr, Owens & Co., Inc., Baltimore, Md.
Chamberlain Medicine Co., Des Moines, Iowa.
Cincinnati Soap Co., The, Cincinnati, Ohio.
Colgate-Palmolive-Peet Co., Chicago, Ill.
Commercial Laboratories, Inc., Newark, N. Y.

Coty, Inc., New York, N. Y.
Dana Company, The, Parkersburg, West Virginia.
Davis Manufacturing Company, Inc., Knoxville, Tenn.
DePree Co., The, Holland, Michigan.
Devore Mfg. Co., The, Columbus, Ohio.
Dill Co., Inc., The, Norristown, Pa.
D'Orsay Perfumeries, Corp., New York City, N. Y.
Earle, Marie, Inc., New York City, N. Y.
Fahrney & Sons Co., Dr. Peter, Chicago, Ill.
Federal Products Co., The, Cincinnati, Ohio.
Fitch Co., The, F. W., Des Moines, Iowa.
Floral Products, Inc., New York, N. Y.
Foley & Co., Chicago, Ill.
Frank Tea & Spice Co., The, Cincinnati, Ohio.
Fries & Fries Co., The, Cincinnati, Ohio.
Gandolfi & Co., L., New York, N. Y.
Gibson, Inc., Guy T., New York City, N. Y.
[fol. 45] Gilbert Bros. & Co., Inc., Baltimore, Md.
Gilmore Drug Co., W. J., Pittsburgh, Pa.
Gilpin Co., Henry B., Baltimore, Md.
Guerlain Perfumery Corporation, New York City, N. Y.
Hale, Justis Drug Co., The, Cincinnati, Ohio.
Harley Co., E. C., Dayton, Ohio.
Heberling Co., G. C., Bloomington, Ill.
Herb Medicine Co., The, Springfield, Ohio.
Herpicide Co., Inc., The, Detroit, Michigan.
Hollander Bros. Drug Co., Rankin, Pa.
Hopper, Inc., Edna Wallace, Chicago, Ill.
Houbigant, Inc., New York City, N. Y.
House of Tre-Jur, Inc., New York City, N. Y.
Howard Drug & Medicine Co., The, Baltimore, Md.
Hudnut, Richard, New York City, N. Y.
Makrauer & Son, Inc., Andrew, Pittsburgh, Pa.
Jergens Co., The Andrew, Cincinnati, Ohio.
Joncaire, Inc., A., Boston, Mass.
Mercer Barber Supply Co., Sharon, Pa.
Nashville Barber Supply Co., Nashville, Tenn.
Old Reliable Hannon Supply Corp., Cincinnati, Ohio.
Pabst & Kohler, Columbus, Ohio.
Pennsylvania Perfumery & Barber Supplies, Pitts-
Brown Bros., Co., Wm. H., Baltimore, Md.
Purnell Co., H. L., Salisbury, Md.
Reeves Barber Supply Co., A., Richmond, Va.

Semones-Hunt Co., Knoxville, Tenn.
Southern Barber's Supply Co., Roanoke, Va.
Bailey Grocery Co., C. L. Marietta, Ohio.
Beall & Steele Drug Co., Steubenville, Ohio.
Bingham Co., The Chas A., Cleveland, Ohio.
Brown Bros., Co., Wm. H. Baltimore, Md.
Cooper & Sons, T. J., Winchester, Va.
Dyke-Keys Co., Steubenville, Ohio.
Kauffman-Lattimer Co., Columbus, Ohio.
Styron, Beggs Co., The, Newark, Ohio.
Sweet Mfg. Co., Inc., The, Pittsburgh, Pa.
Thayer Pharmacal Co., Chicago, Ill.
Tornello & Co., C., Youngstown, Ohio.
Triner Co., Joseph, Chicago, Ill.
United Drug Co., Boston, Mass.
Upjohn Co., The, Kalamazoo, Mich.
Vadsco Sales Corp., New York City, N. Y.
[fol. 46] Vail Bros., Inc., Philadelphia, Pa.
Virginia Dare Extract Co., Brooklyn, New York.
Vogler Drug Co., The Alfred, Cincinnati, Ohio.
Warner & Co., Inc., Wm. R., New York City, N. Y.
Watkins Co., The J. R., Winona, Minn.
Westphal, Paul, New York City, N. Y.
Weyer, George H., Kansas City, Mo.
Wildroot Co., Inc., The, Buffalo, New York.
Williams Co., The, J. B., Glastonbury, Conn.
Wyeth & Bros., Inc., John, Philadelphia, Pa.
Dorn, John G., Sandusky, Ohio.
Engels & Krudwig Co., The, Sandusky, Ohio.
Hammer Co., The A. J., Agent for Beaulieu Vineyards Co., Cleveland, Ohio.
American Oil Co., The, Baltimore, Md.
Baltimore Gas Engineering Corp., The, Charleston, W. Va.
Bourjois, Inc., New York, N. Y.
Calvert Drug Co., The, Baltimore, Md.
Cole Chemical Co., St. Louis, Mo.
Knapp Extract Co., Cleveland, Ohio.
Quaker Maid Co., Inc., The, New York, N. Y.
Reid, Murdoch & Co., Chicago, Ill.
Smith Higgins Co., Inc., Johnson City, Tenn.
Tru-Lax Products Co., Newark, N. J.

Wuppermann Angostura Bitters Agency, Inc., J. W., New York, N. Y.

Third. That all of the products manufactured by the said firms and corporations are required by the National Prohibition Act and the regulations promulgated thereunder to be prepared in accordance with approved formulae and samples duly submitted to the Bureau of Industrial Alcohol for approval, and the preparations sold to the general public are required to be unfit for beverage purposes.

James M. Doran.

It witness whereof I have hereunto set my hand and notarial seal on the day and year first above written.

Marguerite S. Banks, Notary Public. My commission expires 12/1/35. (Seal.)

[fol. 47] In United States District Court

[Title omitted]

Affidavit of G. F. Beyer—Filed October 26, 1931

District of Columbia,
City of Washington, ss:

On this 19th day of December, 1930, personally appeared before me, G. F. Beyer, who being sworn in due form of law, did depose and say:

First. That he is the chemist in charge of the Washington Laboratory of the Bureau of Industrial Alcohol in the United States Treasury Department, and he has had — years' experience in analysing articles containing ethyl alcohol, and determining whether the formulae of such articles comply with the requirements of the laws of the United States prohibiting the sale and transportation of intoxicating liquors, and that it is his duty so to do.

Second. That under the laws of the United States no permit will be granted for the manufacture of any product for medicinal, toilet and culinary purposes the transportation of which in interstate commerce or otherwise would be in violation of any of the laws of the United States pro-

hibiting the sale or transportation in interstate commerce or otherwise of intoxicating liquors.

Third. That under the law and the regulations and based upon his experience in passing on the formulae of such articles and examination of samples of the finished articles, no more undenatured alcohol is authorized under permit in bond for use or actually used therein than the quantity necessary for the extraction or solution of the elements [fol. 48] contained therein and for the preservation of the articles and in addition thereto the finished products must be unfit for beverage purposes or for intoxicating beverage purposes and may legally be used only for the purpose for which authorized.

Fourth. That under the law and regulations and based upon his experience in passing upon formulae and examining samples no more specially denatured alcohol may be used than necessary for the accomplishment of the desired purpose in the proposed process and the finished articles must be unfit for use for beverage purposes, the alcohol not readily recoverable by saponification, distillation, or other process, and may be used only under permit and bond for the purpose for which authorized. Such specially denatured alcohol or the articles made therewith may not legally be used for beverage purposes, or intoxicating beverage purposes.

(Signed) G. F. Beyer.

In witness whereof I have hereunto set my hand and notarial seal the day and year first above written.

(Signed) Norman G. Ellis, Notary Public. Notary Public, D. C., My commission expires Aug. 14, 1933. (Notarial Seal).

In United States District Court

[Title omitted]

Affidavit of John W. Herscher—Filed October 26, 1931

[fol. 49] State of West Virginia,
County of Kanawha, To-wit:

On this 12th day of January, 1931, personally appeared before me, Judith B. Crippen, a notary public of the State

of West Virginia, in and for the County of Kanawha, John W. Herscher, who, being sworn in due form of law, did depose and say that he is president of Hubbard Grocery Company, Inc., and that he is familiar with their business involving the sale of flavoring extracts, toilet articles, perfumes, and other merchandise containing ethyl alcohol, and that he knows of his own knowledge that the said Hubbard Grocery Company, Inc., is forbidden by the rulings of the Commissioner of Prohibition of West Virginia from buying, selling, or offering for sale any such flavoring extracts, toilet articles, perfumes, and other merchandise containing ethyl alcohol, manufactured by any person, firm or corporation within or without the State of West Virginia, unless such person, firm, or corporation has a permit and license issued by the Commissioner of Prohibition of West Virginia to manufacture said articles, and that the Commissioner of Prohibition of West Virginia, or his agents, have threatened and do threaten to seize and confiscate any such articles which said Hubbard Grocery Company, Inc., should buy, sell, or offer for sale, unless the manufacturers of said articles hold said permit.

(Signed) John W. Herscher, Affiant.

Taken, subscribed and sworn to before me this 12th day of January, 1931. My commission expires December 17, 1937. (Signed) Judith B. Crippen, Notary Public in and for Kanawha County, West Virginia.

[fol. 50] In United States District Court

[Title omitted]

Affidavit of Robert B. Lewis—October 26, 1931

State of New York,
County of New York,
City of New York, ss:

Robert B. Lewis, being duly sworn, deposes and says:

That he is the Chief Chemist of Lewis Bros., Inc., a corporation of the State of New York, having its principal

place of business at 26 East 125th Street, in the Borough of Manhattan, City, County and State of New York.

That he has had about twenty years' experience as a chemist, and for eight years has been charged with the supervision of formulae and processes of manufacture employed by the said corporation, and is thoroughly familiar with all formulae and processes so employed which involve the use of alcohol; that all of the products containing alcohol manufactured by the said corporation are manufactured in accordance with formulae approved by the Bureau of Industrial Alcohol (formerly Bureau of Prohibition), and are unfit for beverage purposes and are, therefore, non-potable because of the essential oils and other denaturants employed in the said products, any person attempting to use the said products, for beverage purposes would suffer nausea, gastric irritations, or severe illness, and the said preparations are, and under Federal regulations are required to be, so unpalatable, irritating, and nauseous, that they cannot be consumed as intoxicating beverages.

(Sd.) Robert B. Lewis.

[fol. 51] Sworn to before me this 10th day of January, 1931. (Sd.) Louis W. Feuss. Louis W. Feuss, Notary Public, Queens Co., No. 547. Certificate filed in N. Y. Co. Clerk's No. 252. New York County Register's No. 2F209. Queens County Register's No. 171. Term expires March 30, 1932. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF RAY YANCEY—Filed October 26, 1931

STATE OF MICHIGAN,
City of Detroit,
County of Wayne, ss:

On this 9th day of January, 1931, personally appeared before me, Notary Public of the State of Michigan, in and for the City of Detroit, County of Wayne, Ray Yancey,

who, being sworn in due form of law, did depose and say that he is the Chief Chemist of The Herpicide Company, a corporation of the State of Michigan, having its principal place of business at 63-71 Milwaukee Avenue, West; that he has had ten years' experience as a chemist and for five years has been charged with the supervision of formulae and processes of manufacture employed by the said cor- [fol. 52] poration, and is thoroughly familiar with all formulae and processes so employed which involve the use of alcohol; that all of the products containing alcohol manufactured by the said corporation are manufactured in accordance with formulae approved by the Bureau of Industrial Alcohol (formerly Bureau of Prohibition), and are unfit for beverage purposes and are, therefore, not intoxicating liquors.

Because of the essential oils and other denaturants employed in the said products, any person attempting to use the said products for beverage purposes would suffer nausea, gastric irritations, or severe illness, and the said preparations are, and under Federal regulations are required to be, so unpalatable, irritating, and nauseous, that they cannot be consumed as intoxicating beverages.

(Sgd.) Ray Yancey. (Signature of Affiant.)

As witness my hand and seal this 9th day of January, 1931.

(Sd.) Ralph E. Lewis, (Notary Public.) My commission expires January 1st, 1933. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOHN GLASSFORD—Filed October 26, 1931

[fol. 53] STATE OF MARYLAND,
City of Baltimore, ss:

On this 10th day of January, 1931, personally appeared before me, a Notary Public of the State of Maryland, in and for the City of Baltimore, John Glassford, who being sworn in due form of law did depose and say:

That he is a graduate of the New York College of Pharmacy (later included in Columbia University) and received from the said institution the degree of Doctor of Pharmacy; that he has pursued the calling of pharmacist and chemist for a period of twenty (20) years, and for a period of five (5) years has been Chief Chemist and Superintendent of the Drug and Flavoring Extract Departments of McCormick & Co., Inc., and that in the course of his work with McCormick & Co., Inc., he is required to supervise the formulae of all products containing alcohol manufactured by McCormick & Co., Inc., and that he is charged with superintending their manufacture and ascertaining that they are made in accordance with the said formulae; that he is thoroughly familiar with all of the products containing alcohol manufactured by said McCormick & Co., Inc.; that he knows of his own knowledge that all of said products are manufactured in accordance with formulae approved by the Bureau of Industrial Alcohol (formerly Bureau of Prohibition), and that all of said products have been passed upon by the said Bureau as unfit for beverage purposes and, therefore, are not intoxicating liquors; that of his own knowledge he knows that the said products are unfit for beverage purposes, because the essential oils and other denaturants included in said products are of such a nature that the consuming of said products for beverage purposes would involve serious gastric irritations or disorders, or nausea, and, in some cases, if persisted in, serious illness; that none of said products are sold for beverage purposes, but they are sold strictly for medicinal, toilet and culinary purposes.

(Sd.) John Glassford.

In witness whereof I have hereunto set my hand and [fol. 54] Notarial Seal on the day and year first above written.

(Sd.) Richard T. Pilling, Jr., Notary Public. (Notarial Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF WILLOUGHBY M. McCORMICK—Filed October 26, 1931

STATE OF MARYLAND,
City of Baltimore, ss:

On this fourteenth day of January, 1931, personally appeared before me, a Notary Public of the State of Maryland in and for the City of Baltimore, Willoughby M. McCormick, who being sworn in due form of law, did depose and say that he is the President of McCormick & Co., Inc., one of the plaintiffs in the above entitled case, and that he knows of his own knowledge that the said McCormick & Co., Inc., sells annually in the State of West Virginia, merchandise containing alcohol, of a value of not less than Thirteen Thousand Dollars ($13,000.00), and in order that the said corporation may sell the said merchandise, it is required, under the rulings of the Commissioner of Prohibition of West Virginia, to carry a wholesale liquor dealer's license and to pay an annual fee of Fifty Dollars ($50.00), and that the annual profit derived from the sale of said merchandise is not less than Fifteen Hundred Dollars ($1,500.00), and [fol. 55] that the right of the said corporation to ship the said merchandise into West Virginia in interstate commerce is worth more than Three Thousand Dollars ($3,000.00).

Willoughby M. McCormick.

As witness my hand and notarial seal the day and year first above written.

Richard T. Pilling, Jr., Notary Public. (Seal.)

IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF T. A. BORRADAILE, ETC.—Filed October 26, 1931

T. A. Borradaile being first duly sworn deposes and says:

1. He is a chemist, residing in Charleston, West Virginia; that *that* he has had training and experience in his work as follows: He graduated from Miami University, 1908, with the degree of A. B., majoring in chemistry; he

taught chemistry in high schools for about five years, engaged in chemical work at Tampa, Florida, for four years in handling petroleum products, in 1917 was engaged with Warren-Klipstein Chemical Company of Carteret, N. J., and South Charleston, West Virginia, in the production of chlorine products, was City Chemist of Charleston, West Virginia, 1919-25, and was employed as Chemist and [fol. 56] Inspector of the State Department of Prohibition of West Virginia 1925-29.

Affiant says that as City Chemist his work included the examination by chemical analysis of foods, drugs and liquors, and that in the years 1923 and 1924 he was frequently called upon to make chemical analyses and tests of alcoholic preparations submitted to the State Department of Prohibition for classification under its permit system; and that in 1925 he was employed by said Department as Chemist and Inspector in its work of regulating and restricting the sale of alcoholic products offered for sale under the prohibition laws of the state.

While employed in the positions aforesaid, affiant made chemical tests and analyses of all classes of "liquors" offered for sale and passed upon and classified by the Department. These preparations included patent and proprietary medicines, N. F. and U. S. P. formulae, flavoring extracts, hair tonics and lotions, toilet waters and perfumes, tonics, cordials, etc., etc. In addition to such tests affiant was frequently called to testify in cases in which the City or State was prosecuting for sale and possession of liquors, and the question as to whether the particular "liquor" or preparation containing ethyl alcohol would produce intoxication would arise. For the past five or six years affiant has had frequent experiences in such cases in several courts in the state.

2. By reference to the records in the State Department of Prohibition affiant says that McCormick & Company, Inc., of Baltimore, Maryland, under date of April 2, 1924, filed a list of alcoholic products with the State Commissioner of Prohibition of West Virginia, and made application at the same time for a permit to sell said products in the State; that affiant assisted in the examination and classification of said products, and that a permit was issued

to said applicant. The original application, a copy of said list and a copy of said permit is here filed as part hereof and marked respectively, "Exhibit 1", "Exhibit 2" and "Exhibit 3", "with affidavit of T. A. Borradaile".

Affiant further states that said McCormick & Company, Inc., has by application renewed its said permit for each year since 1924 up to and including the year 1930; that in [fol. 57] so far as affiant is informed the same line of products has been offered for sale under said permit each year; that the various preparations in said list falling in "Class A", "Class B" and "Class C" of "Prohibition Department Ruling Number Five", are such preparations as will produce intoxication and drunkenness; that affiant bases this statement on the alcoholic content, the potability and the physiological effect of the final product, and upon his actual experience and observation that said preparations are intoxicating in fact.

T. A. Borradaile.

Subscribed and sworn to before me this 10 day of January, 1931. S. E. Childress, Notary Public. My commission expires Oct. 28, 1940.

EXHIBIT 1 WITH THE AFFIDAVIT OF T. A. BORRADAILE

S. P. C. No. 26

Application by Wholesale Dealer in Liquors as Defined in Section 1 for Permit to Purchase and Sell Same for Medicinal, Pharmaceutical, Scientific, and Mechanical Purposes

April 2nd, 1924.

To the State Commissioner of Prohibition:

The undersigned McCormick & Co., Incorporated. Whose business is Manufacturer. Located at Baltimore, Maryland hereby makes application for a permit to purchase and sell at wholesale, liquors as defined in Section 1, for medicinal, scientific, pharmaceutical and mechanical purposes.

It is hereby certified that the undersigned has not within one year prior to the date hereof violated the terms of any

[fol. 58] permit issued under the Prohibition Law of West Virginia, and that this applicant will observe the terms of any permit issued upon this application and the provisions of all laws of the State relative to the acts for which same is issued.

McCormick & Co., Incorporated. Willoughby N. McCormick, Pres.

STATE OF MARYLAND,
City of Baltimore, To wit:

Subscribed and sworn to before me this 2nd day of April, 1924.

M. Marie Shriver, Notary Public. (Seal.)

EXHIBIT 2 WITH THE AFFIDAVIT OF T. A. BORRADAILE

April 2, 1924.

Extracts:

	Alcohol content, approximately
Allspice	82%
Almond, Bee Brand	36%
Almond, Clover Brand	32%
Almond, Silver Medal	23%
Banana, Bee Brand	45%
Banana, Clover Brand	42%
Banana, Silver Medal	42%
Cherry, Bee Brand	25%
Cherry, Clover Brand	17%
Cinnamon, Bee Brand	85%
Cinnamon, Clover Brand	65%
Clove, Bee Brand	67%
Fragoma, an Imitation Vanilla	35%
Fragoma, Tonka type	30%
[fol. 59] Ginger Ale	47%
Lime, terpeneless	52%
Lemon, Clover Brand	78%
Lemon, Bee Brand	80%
Lemon, Con-Bak	78%
Lemon, Silver Medal	29%
Lemon, terpeneless	52%

Extracts:

	Alcohol content, approximately
Maple, Bee Brand	31%
Nutmeg, Bee Brand	72%
Orange, terpeneless	52%
Orange, Bee Brand	80%
Orange, Clover Brand	78%
Pistachio, Bee Brand	47%
Peppermint, Bee Brand	85%
Pineapple, Bee Brand	47%
Pineapple, Clover Brand	38%
Pineapple, Silver Medal	38%
Raspberry, Bee Brand	15%
Raspberry, Clover Brand	12%
Raspberry, Silver Medal	12%
Root Beer, Bee Brand	6%
Rose, Bee Brand	94%
Strawberry, Bee Brand	28%
Strawberry, Silver Medal	17%
Sarsaparilla	20%
Violet, Bee Brand	82%
Vanilla, Bee Brand	42%
Vanilla, Crescent Brand	42%
Vanilla, Clover Brand	42%
Vanilla, Con-Bak Brand	42%
Vanilla, Silver Medal	14%
Wild Cherry	39%
Wintergreen	70%
Peach, Bee Brand	25%
Peach, Clover Brand	25%
Soda Foam	6%
Fruitall Lime Flavor	15%
[fol. 60] Fruitall Lemon Flavor	15%
Fruitall Orange Flavor	15%

Colors:

Green, Bee Brand	10%
Kake	14%
Pink, Bee Brand	10%
Red, Bee Brand	8%
Violet, Bee Brand	10%
Yellow, Bee Brand	10%

Tinctures:

	Alcohol content, approximately
Iodine	84%
Iron	62%
Asafœtida	82%
Aconite	67%
Arnica	40%

Cologne:

Clover Blossom	35%

Drugs:

Antiseptic, Reliable Brand	60%
Cactoria	3%
Cough Syrup, White Pine and Tar	10%
Diarrhœa Remedy	60%
Death to Pain	54%
McCord's Magic Medicine (for stock)	80%
Syrup of Figs, Compound	6%
Toothache Drops	25%
Turlington's Balsam	80%
Vermifuge	2½%
Aromatic Spirits of Ammonia	66%
Spirits Camphor	85%
Paregoric	40%
Spirits Nitre (drug trade only)	90%
Hoffman's Anodyne	65%
Godfrey's Cordial	5%
Bateman's Drops	48%
Witch Hazel	15%
Bay Rum, denatured	47%

[fol. 61] EXHIBIT 3 WITH THE AFFIDAVIT OF T. A. BORRADAILE

S. P. C. No. 28. State Permit No. 5375

Wholesale Dealer's Permit under the State Prohibition Law

STATE OF WEST VIRGINIA:

Office of State Commissioner of Prohibition, Charleston, West Virginia

McCormick & Company, Inc., whose location is (City) Baltimore, (County) ——, (State) Maryland, whose busi-

ness is that of Manufacturers, having made application for a permit as a wholesale dealer, to purchase, sell and keep for sale and transport liquors in accordance with the provisions of Chapter 32-a of the Code of West Virginia, and not otherwise, which said application is now on file in my office and the required fee paid.

Now, therefore, I, W. G. Brown, State Commissioner of Prohibition, by virtue of authority by law in me vested, do hereby issue this permit, thereby authorizing the said McCormick & Company, Inc., Light-Barre & Charles Sts., Baltimore, Maryland, as a wholesale dealer to purchase, sell and keep for sale and transport liquors as defined in Section 1 of Chapter 32-a of the Code of West Virginia, and in accordance with the provisions of the Prohibition Law of this State and of the United States. Sales are authorized to holders of State Permits, only.

This permit shall be in force from and after the date thereof and until December 31, 1924, unless sooner annulled.

Given under my hand at the City of Charleston, State of West Virginia, this January 1st, 1924.

—— ——, State Commissioner of Prohibition.

[fol. 62] In United States District Court, Southern West Virginia

In Equity. No. 2866

McCormick & Co., Inc., a Corporation, and Durham Bros. Co., Inc., a Corporation, Plaintiffs,

vs.

W. G. Brown, State Commissioner of Prohibition of the State of West Virinia, and Howard B. Lee, Attorney General of the State of West Virginia, Defendants

Final Decree—Dec. 3, 1931

This cause having been submitted on the 21st day of October, 1931, to the undersigned sitting under the authority of Section 266 of the Judicial Code as amended (28 U. S. C. A., Section 380), upon motion of the plaintiffs for an interlocu-

tory injunction, as set out in an order of submission entered in this cause on October 26, 1931, the court upon consideration of the plaintiffs' verified bill of complaint and exhibits filed therewith, the verified answers of the defendants and exhibits filed therewith, and the general replication to said answers, and the affidavits of James M. Doran, G. F. Beyer, John W. Herscher, Robert B. Lewis, Ray Yancey, John Glassford, Willoughby N. McCormick and T. A. Borradaile, and the arguments of counsel, doth adjudge, order and decree that the interlocutory injunction prayed for by the plaintiffs be denied.

And thereupon, by consent of all the parties, this cause came on to be heard upon the application of the plaintiffs for a permanent injunction, and it appearing that none of the parties to this suit desire to introduce any evidence other than that presented upon the motion to grant the interlocutory injunction, the cause is by agreement of all parties submitted for final hearing upon the plaintiffs' verified bill of complaint and exhibits filed therewith, the verified answers of the defendants and exhibits filed therewith, and [fol. 63] the general replication to said answers and the affidavits of James M. Doran, G. F. Beyer, John W. Herscher, Robert B. Lewis, Ray Yancey, John Glassford, Willoughby N. McCormick, and T. A. Borradaile, and the arguments of counsel, and the court being fully advised in the premises, and being of the opinion that the plaintiffs have not shown themselves entitled to the relief prayed for in their said bill, for reasons stated in writing and filed with the record herein as part hereof, it is adjudged, ordered and decreed that the application of the plaintiffs for a permanent injunction be and the same is hereby denied, and that the plaintiffs' bill be dismissed and that the plaintiffs do pay to the defendants their costs about their defense in this behalf expended.

The plaintiffs, by counsel, having declared their intention to appeal this cause to the Supreme Court of the United States, the execution of this decree shall be stayed for a period of thirty days from the date of the entry of this order, within which time the plaintiffs may apply for said appeal. But said stay shall not be effective until the plaintiffs, or some responsible party, shall execute and file with the clerk of this court, a bond with good and sufficient se-

curity, in the sum of Five Hundred Dollars conditioned to pay the costs of said appeal.

Elliott Northcott, Judge of the Circuit Court of Appeals for the Fourth Circuit. W. E. Baker, Judge of the United States District Court for the Northern District of West Virginia. Geo. W. McClintic, Judge of the United States District Court for the Southern District of West Virginia.

[fol. 64] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

No. 2866

McCORMICK & Co., INC., a Corporation, and DURHAM BROS. Co., INC., a Corporation, Appellants,

versus

W. G. BROWN, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, Appellees

(Argued and Submitted, at Charleston, West Virginia, on October 21, 1931)

Before Northcott, Circuit Judge, and William E. Baker and George W. McClintic, District Judges

OPINION

NORTHCOTT, Circuit Judge:

A bill in equity was filed in this Court by McCormick & Co., Inc., a Maryland corporation, engaged in the City of Baltimore in the manufacture of various products used for toilet and culinary purposes, and Durham Bros. Co., a Virginia corporation, engaged as a wholesale dealer in groceries and food products in the City of Roanoke, Virginia, as complainants, against W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of that State. The suit was instituted by the complainants on their own behalf and for the benefit of numerous other non-resident manu-

facturers or wholesale dealers in commercial products containing ethyl alcohol as a necessary solvent or preservative, to secure an injunction to restrain the State Officials from requiring them to procure permits at the cost of $50.00 per annum for the sale and transportation of their goods, and from prosecuting any proceeding for their refusal to pro- [fol. 65] cure such permits.

The District Court granted the appellants a temporary restraining order, and at a later date, a preliminary injunction. By agreement of the parties, the cause was submitted for final hearing upon the same evidence introduced upon the hearing for the preliminary injunction. On the final hearing the District Court denied the application for a permanent injunction and dissolved the preliminary injunction theretofore granted.

From this action of the District Court complainants appealed to the Circuit Court of Appeals for the Fourth Circuit, which court handed down an opinion by Soper, Circuit Judge, on October 12, 1931, holding that the case was one falling within the provisions of Section 266 of the Judicial Code as amended (28 U. S. C. A., Section 380), and that it was the duty of the District Judge to convene a three-judge court to try the case in accordance with that act.

The District Judge called a three-judge court, which convened at Charleston, West Virginia, on October 21, 1931, and after argument the cause was submitted on the record as it was made up for the former hearing.

Findings of Fact

The court adopts as correct the statement in the opinion of the Circuit Court of Appeals above referred to, both as to the facts and the contentions of the parties. This statement is as follows:

"The complainants alleged that the products in question are used and usable exclusively for medicinal, mechanical, toilet or culinary purposes, and are manufactured and sold under permits issued by the United States Bureau of Industrial Alcohol, and approved by the United States Bureau of Prohibition; and that none of them contains intoxicating liquors or is fit for beverage purposes within the meaning of the laws of the United States. The State Commissioner had declared that all products purchased from non-

resident dealers, not clothed with permits, would be subject to seizure, confiscation and destruction, and the persons selling or keeping for sale the products in West Virginia would be prosecuted under the criminal laws of the State. These requirements of the Commissioner, it was charged, were without authority in law and constituted unwarranted attempts on his part to hinder and obstruct complainants' lawful interstate commerce. They asserted that the jurisdiction of the court was established because the matter in controversy exceeded in value the sum of $3,000.00, and the complainants and defendants were respectively citizens of different states; and also because the complainants sought in the suit to redress the deprivation, under color of unlawful regulation by the Commission- of Prohibition, of rights, privileges and immunities secured to the complainants by the Constitution of the United States, to wit: the right to ship and transport the products manufactured [fol. 66] or sold by them in interstate commerce free from unlawful restrictions or regulation by the Commissioner of Prohibition.

"The State officials, by answer, denied the jurisdictional allegations of the bill of complaint and asserted that all of their actions performed or threatened were authorized by certain State enactments and regulations, of which the following is a resume. A constitutional amendment, effective on and after July 1, 1914 (Constitution of West Virginia, Article 6, Section 46), prohibited the manufacture or sale of intoxicating liquor within the State, except liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and except the sale of denatured alcohol for industrial purposes under regulations to be prescribed by the Legislature. That body was enjoined to enact laws to carry the amendment into effect and laws were passed which are now codified in Chapter 60 of the Official Code of West Virginia of 1931. The word "liquors" was given a wide significance so as to include not only all kinds of intoxicating beverages, but also all liquors, mixtures or preparations, whether patented or not, which will produce intoxication. (Section 1, Article 1.) The manufacture and sale of liquors was placed under the supervision of a Commissioner of Prohibition and under such rules and regulations as he might from time to time prescribe. (Section 3,

Article 2.) No one is allowed to sell, purchase or transport any liquor without first obtaining a permit from the Commissioner of Prohibition so to do. Permits expire annually on December 31. The fee for a manufacturer's or wholesale dealer's permit is $50.00. (Section 5, Article 1.) In case of sale, in which a shipment or delivery of liquor is made by a carrier, the sale is deemed to be made in the county where the delivery is made to the consignee. (Section 4, Article 1.) Common carriers are forbidden to carry liquors into the State, and persons in the State are forbidden to receive liquors from a carrier except in case of pure grain alcohol and wine and such preparations as may be sold by druggists. (Sections 9 and 13 of Article 1). It is unlawful for any non-resident vendor to sell or furnish liquors to any person within the State when such liquors are intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the State laws; and in case the delivery of the liquors is made by a carrier, the sale or furnishing is deemed to be made in the county wherein the delivery is made. (Section 11, Article 1).

"The Commissioner of Prohibition appointed under the authority of the statutes has promulgated certain regulations, wherein a non-resident manufacturer, doing business in the State, is classed and treated as a wholesale dealer of whom an annual license fee of $50.00 is required. A wholesale dealer is declared to be one whose business is that of selling at wholesale, ethyl alcohol in any form, whether pure, medicated or denatured, and wine as permitted and supervised by the federal government, or selling as aforesaid any liquor mixture or preparation, whether patented or not, which will produce intoxication or come within the definition of liquors in Section 1, Article 1 of the State law. The regulations of the Commissioner also classify alcoholic preparations, the sale of which is prohibited in the State defining those which may be sold by the drug trade only under permit, those which may be sold by all dealers under permit, and those which may be sold by all dealers without permit. Goods of the sort manufactured and sold by the complainants are placed in the category of those which may be sold by dealers only under permit.

"Thus it appears that the State statutes cover the activities of non-resident vendors, when the liquors sold or

furnished by them are intended to be used in violation of the local law, and the term "liquors" has been given a significance sufficiently broad to include the products of the [fol. 67] complainants; and the Commissioner's regulations have classified non-resident manufacturers of liquor doing business in the State as wholesale dealers required to take out an annual permit before sending merchandise into the State, and have classified the goods of the kind made or sold by complainants as those which may be sold only under permit.

"Upon their allegations, the complainants prayed an injunction against the Commissioner and the Attorney General to restrain them from requiring complainants by legal proceedings to take out permits and pay the license fees, and from causing the complainants to be arrested for refusal to procure permits, and from interfering in any manner with complainants' business. An order upon the defendants to show cause why a preliminary injunction should not be granted, and also a temporary restraining order pending the hearing on the preliminary injunction were prayed. Thereupon the District Judge issued a temporary restraining order which seems to have been kept alive by consent until the hearing and determination of the motion for preliminary injunction. The final decree recites that this motion was submitted to the court on the pleadings, exhibits and affidavits of the parties, whereupon the court decreed that the preliminary injunction be granted until its further order. By consent of all the parties, the application for a permanent injunction was then submitted upon the same pleadings, exhibits and affidavits which were considered upon the motion for preliminary injunction; and the court, being of the opinion that the complainants had not shown themselves entitled to the relief prayed, adjudged in the same decree that the application for permanent injunction should be denied and the preliminary injunction theretofore granted should be dissolved. The complainants appealed.

"The Complainants concede the constitutional validity of the statutes of West Virginia but complain that the State officials have wrongfully interpreted them to authorize the regulations of the Prohibition Commission and the actions injurious to the complainants which he threatens to take. The right of the State to exercise a measure of

control over the interstate commerce in intoxicating liquor within its borders is conceded by complainants, by reason of the provisions of the Wilson Act of August 8, 1890 (27 U. S. C. A. 121), the Webb-Kenyon Act of March 1, 1913 (27 U. S. C. A. 122), and the Reed Amendment of March 4, 1917 (27 U. S. C. A. 123); but it is contended that the term "Intoxicating liquors" was used in the same significance in these statutes as in the National Prohibition Act and hence must be limited to liquors containing ½ of 1% or more of alcohol by volume, which are fit for beverage purposes (27 U. S. C. A. Section 4). Hence it is said that Congress has given the State no authority to regulate, control or forbid the interstate commerce in other products containing alcohol, and the traffic in them is lawful and unrestricted if the laws and regulations of the federal government are obeyed. In addition it is contended that West Virginia has passed no statute applicable to the business of the complainants because they sell only to licensed local dealers, and there is no intent on the part of any interested person to violate the State law. And so complainants reach the conclusion that the regulation of the Commissioner requiring them to take out permits and pay license fees for doing business in West Virginia is without warrant of authority in either federal or State law; and constitutes an unwarranted exercise of the power to regulate interstate commerce committed to Congress by the Constitution of the United States.

"These contentions are strongly combatted by the representatives of the State who claim that the Commissioner of Prohibition is supported by both federal and state legislation in every official act affecting the complainants which he has performed or threatened to perform. They contend also that the District Court was without jurisdiction to [fol. 68] hear and determine the case on the ground that the matter in controversy does not exceed $3,000.00 as required by statute 28 U. S. C. A. 41 (1), since the license fee was only $50.00 and it was not clearly shown that a business equal in value to the jurisdictional amount was involved. It is not entirely clear under the State laws and regulations that the Commissioner of Prohibition has not the power in his discretion to refuse a permit to a nonresident manufacturer or wholesale dealer who offers to pay the license fee. Moreover, there are cases which hold that when a license to do business is concerned, the amount

involved is not measured by the size of the burden thus imposed but by the value of the business interfered with. Southern Expr. Co. v. Mayor, &c. of Ensley, 116 Fed. 756; City of Hutchinson v. Beckham, 118 Fed. 399; Board of Trade v. Cella Commission Co., 145 Fed. 28; Jewel Tea Co. v. Lee's Summit, 198 Fed. 532; Campbell Baking Co. v. City of Maryville, 31 Fed. (2) 466. Compare McNeill v. Southern Ry. Co., 202 U. S. 543; Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121; Packard v. Banton, 264 U. S. 140; Western & Atl. R. v. Railroad Commission, 261 U. S. 264".

Conclusions of Law

An examination of the authorities cited in the opinion of the Circuit Court of Appeals on the question of jurisdiction leads us to the conclusion that this court has jurisdiction. The amount is not measured alone by the size of the license fee required to be paid but also by the value of the right to do business. This is clearly the law where the State Commissioner of Prohibition is, as here, given the exercise of some discretion as to the granting or refusing to grant the permit.

The pertinent portion of the West Virginia Statute on this point will be found in Section 5, Article 1, Chapter 60 of the Official Code of West Virginia, and reads as follows:

"* * * provided, that no one shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in Section 1 of this article and as herein excepted, without first obtaining a permit from the Commissioner of Prohibition so to do." * * *

As to whether the imposition of the requirement to secure the permit and pay the fee therefor is in violation of the Federal Constitution and laws and a burden on interstate commerce, it was admitted in the argument that if the articles for the sale of which the permit is required properly came under the definition of "liquors" as used in the West Virginia Statute, then the state has the right to regulate or restrict their sale within its borders.

Section 1 of Article 1 of Chapter 60, Official Code of West Virginia reads as follows:

"The word 'liquors', as used in this chapter, shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this statute; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing one-[fol. 69] half of one per cent, or more of alcohol, by volume, shall be deemed spirituous liquors, and shall be embraced in the word 'liquors', as used in this statute."

A careful study of this and the related sections of the West Virginia Code (see opinion of Circuit Court of Appeals) leads us to the conclusion that the articles in question come within the definition of "liquors" as defined by the Legislature of West Virginia. This has been the holding of the West Virginia courts. State v. Muncey, 28 W. Va. 494; State v. Durr, 69 W. Va., 251; State v. Good, 56 W. Va. 215; State v. Henry, 74 W. Va. 72. That the Federal courts are bound by the interpretation of a State Statute by the highest court of that state is unquestioned.

Pursuant to provisions of the State Statutes (Section 3, Article 2, Chapter 60) the Prohibition Commissioner is empowered to prescribe rules and regulations governing the sales of the articles in question. The Commissioner, in his regulations, has placed "liquors to be sold by the drug trade only under permit", in Class "B", which class requires the permit and fee complained of. Regulations of this character, when not in conflict with the express statutory provisions, have the force and effect of law. (United States v. Butler, 49 Fed. (2) 52, and authorities there cited.)

The various acts of Congress, with regard to State Prohibition laws that preceded the enactment of the Eighteenth Amendment and the National Prohibition Act, were not repealed by the Amendment and the Act. (Washington v. Miller, 255 U. S. 422.) These included the Wilson Act, Webb-Kenyon Act and the Reed Amendment, and these acts taken together with the amendment and the National Prohibition Act give the states concurrent power to enforce prohibition and do not invalidate the prohibition laws of a state. These laws employ different definitions and penal-

ties in aid of the amendment. The states are not prohibited from passing their own enforcement laws so long as they do not make legal that which the federal laws make illegal. Within proper bounds and as long as they do not conflict with the federal law or unduly burden interstate commerce the laws of West Virginia are determinative of the question [fol. 70] here involved. In prohibiting the sale of liquor transported into the state from another state, except under permit from the State Commissioner of Prohibition, the West Virginia State laws, as enacted and enforced at this time, are valid.

The right of the State Commissioner of Prohibition to require the permit under the laws of West Virginia is not superseded or affected by the fact that such dealers hold their permit from the Federal Government. Federal courts will not interfere with the internal affairs of a state when sought to be regulated under State Constitutions and Statutes, unless the necessity for such interference is unquestioned. Such a case is not here presented, and the court is of the opinion that the relief prayed for should be denied and the injunction not granted.

Elliott Northcott, U. S. Cricuit Judge. W. E. Baker, U. S. District Judge. Geo. W. McClintic, U. S. District Judge.

[fol. 71] IN UNITED STATES DISTRICT COURT

In Equity. No. 2866

McCORMICK & Co., INC., a Corporation, and DURHAM BROS. Co., INC., a Corporation, Plaintiffs,

vs.

W. G. BROWN, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, Defendants

ORDER ALLOWING APPEAL—Dec. 21, 1931

The appellants, the plaintiffs in the above styled cause, and each of them, having prayed for the allowance of appeal in this cause to the Supreme Court of the United States

from the decree made and entered in the above styled suit by the District Court of the United States for the Southern District of West Virginia, with three judges sitting therein under the provisions of Section 266 of the Judicial Code as amended, (28 U. S. C. A., 380), on the 3rd day of December, 1931, and from each and every part thereof, and having presented their petition for appeal, assignments of error, and prayer for reversal pursuant to the statute and rules of court in such cases made and provided, which are hereby ordered to be filed;

It is now here ordered that an appeal be, and that the same is hereby, allowed to the Supreme Court of the United States from the District Court of the United States for the Southern District of West Virginia, in this cause, as provided by law, and it is further ordered that the clerk of this court shall prepare and certify a transcript of the record, including all the proceedings had and papers and exhibits filed in this cause, and shall transmit the same to the Supreme Court of the United States, according to law, as prayed for;

And it is further ordered that security for costs on appeal be fixed in the sum of Five Hundred Dollars.

[fol. 72] Elliott Northcott, United States Circuit Judge. W. E. Baker, United States District Judge. Geo. W. McClintic, United States District Judge.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed December 21, 1931.

The Petition of McCormick & Co., Inc., a corporation, and Durham Bros. Co., Inc., a corporation, plaintiffs herein, respectfully represents:

That the plaintiffs and those on whose behalf they sue are aggrieved by the judgment and decree rendered herein on the 3rd day of December, 1931, in favor of the defendants, refusing to issue a permanent injunction as prayed for in the bill of complaint in this case, and the said plaintiffs,

for the reasons specified in the assignment of errors filed herein, desire to appeal from said decree to the Supreme Court of the United States.

Wherefore your petitioners pray that said appeal may be allowed, on their giving bond in the amount to be fixed by this Court; that said appeal may be made returnable to the Supreme Court of the United States, according to law; and that a transcript of the record, proceedings, papers and exhibits upon which said decree was rendered, duly authenticated, be sent to said Supreme Court of the United States.

And your petitioner prays for all general and equitable relief.

Philip C. Friese, Rummel, Blagg & Stone, Solicitors for Plaintiffs.

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 21, 1931

The plaintiffs above named pray for an appeal from the decree of this court in the above styled action, denying to them a permanent injunction as prayed for, to the Supreme Court of the United States, and assign for error:

1. The District Court of the United States for the Southern District of West Virginia, with three judges sitting as provided by Section 266 of the Judicial Code as amended (28 U. S. C. A., S. 380), erred in refusing the prayer of plaintiffs' bill for a permanent injunction.

2. Said district Court further erred in refusing to enjoin the defendants W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, from requiring or attempting to require by legal or equitable process, or otherwise, the plaintiffs in this cause and those on whose behalf they sue, to secure permits from the defendant, W. G. Brown, Commissioner of Prohibition of the State of West Virginia, and to pay for said permits an

annual license fee, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by the said State Prohibition Commissioner to sell said products.

3. Said District Court further erred in refusing to hold that the action of the defendant W. G. Brown, State Prohibition Commissioner of the State of West Virginia, in requiring the plaintiffs and those on whose behalf they sue, to secure from said State Prohibition Commissioner per- [fol. 75] mits and pay therefor an annual license fee, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by said Prohibition Commissioner to sell said products, constitutes an unlawful interference with the interstate business of the plaintiffs.

4. Said District Court further erred in holding that under the provisions of the Wilson Act, Webb-Kenyon Act, Reed Amendment, the Eighteenth Amendment, to the Constitution of the United States, Volstead Act, and Section 46, Art. 6 of the Constitution of West Virginia, and Chapter 60, Official Code of West Virginia, the defendant W. G. Brown, State Prohibition Commissioner of West Virginia, was warranted in requiring the plaintiffs and those on whose behalf they sue, to secure from said defendant, Prohibition Commissioner, annual permits and to pay therefor an annual license fee, before being allowed to sell and transport their products in interstate commerce to dealers in West Virginia holding licenses from the defendant, State Prohibition Commissioner, to sell the same.

For which errors the said plaintiffs pray that the said decree of the District Court of the United States for the Southern District of West Virginia, with three judges sitting as aforesaid, entered on the 3rd day of December, 1931, in the above styled cause be reversed, with directions to enter a decree granting a permanent injunction as prayed for in the plaintiffs' bill of complaint filed herein.

Philip C. Friese, Rummel, Blagg & Stone, Solicitors for Plaintiffs.

[fols. 76 & 77] Bond on appeal for $500.00, approved and filed December 21, 1931, omitted in printing.

[fol. 78] IN UNITED STATES DISTRICT COURT

[Title omitted]

WAIVER OF CITATION—Filed December 21, 1931

McCormick & Company, Inc., a corporation, and Durham Bros., Inc., a corporation, having filed their assignments of error, petition for appeal and bond for costs, and having been allowed an appeal to review the above styled cause in the Supreme Court of the United States, W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, do herby waive the issuance and service of a citation herein, and do enter their appearance in the Supreme Court of the United States.

Dated this 21st day of December, 1931.

H. B. Lee, Attorney General of West Virginia. W. G. Brown, State Commissioner of Prohibition of West Virginia.

[fol. 79] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO PREPARATION OF TRANSCRIPT—Filed December 21, 1931

It is hereby stipulated and agreed by and between the solicitors for the respective parties that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

The bill of complaint and exhibits filed therewith.

The answer and exhibits filed therewith.

The affidavits of James M. Doran, G. F. Beyer, John W. Herscher, Robert B. Lewis, Ray Yancey, John Glassford, Willoughby N. McCormick, and the affidavit of T. A. Borradaile and exhibits filed therewith.

The order of submission.

The order denying the interlocutory injunction.

The order denying the permanent injunction.

The opinion of the Court.

The petition for appeal.
The assignments of error.
The order allowing appeal.
The appeal bond.
The waiver of citation of appeal.
Stipulation as to preparation of transcript of record.
Dated December 21, 1931.

Maurice J. Crocker, Rummel, Blagg & Stone, Solicitors for Plaintiffs. H. B. Lee, Attorney General; R. Dennis Steed, Asst. Atty. Gen.; W. G. Brown, Solicitors for Defendants.

[fol. 80] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 81] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Jan. 12, 1932

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this court in this case, are as follows:

Point 1. That the United States District Court for the Southern District of West Virginia, with three judges sitting, as provided by Section 266 of the Judicial Code as amended (28 U.S.C.A., Section 380) erred in refusing to grant a permanent injunction against the defendants W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, restraining said defendants from requiring, in accordance with certain rules and regulations published and enforced by said defendant State Prohibition Commissioner, the appellants and those on whose behalf they sue, to secure an annual permit and pay therefor a fee of $50.00, before being permitted to sell and transport in interstate commerce products containing ethyl alcohol [fol. 82] for the manufacture and sale of which they hold permits issued by the United States Bureau of Industrial Alcohol, to dealers in West Virginia holding license from

the defendant State Prohibition Commissioner to receive, store and sell such products, because such action of defendants constitutes an unlawful interference with the rights guaranteed to appellants by the Commerce Clause of the Constitution of the United States.

Point 2. That the United States District Court for the Southern District of West Virginia erred in holding that under the provisions of the Wilson Act, Webb-Kenyon Act, Reed Amendment, the Eighteenth Amendment to the Constitution of the United States, Volstead Act, Section 46, Article 6 of the Constitution of West Virginia and Chapter 60 of Official Code of West Virginia the defendants were warrented in requiring the appellants and those on whose behalf they sue, to secure from the said defendant State Prohibition Commissioner annual permits and to pay therefor an annual permit fee, before being allowed to sell and transport their products containing ethyl alcohol in interstate commerce to dealers in West Virginia holding licenses from the defendant State Prohibition Commissioner to receive, store and sell the same, because such requirements constitute an unlawful interference with the interstate commerce rights guaranteed to appellants by the Commerce Clause of the Constitution of the United States for:

(a) Appellants' products are not "intoxicating liquors" within the meaning of the federal statutes pertaining to the interstate transportation of "intoxicating liquors".

(b) Appellants' products are not "intoxicating liquors" within the state prohibition laws of West Virginia.

(c) The federal laws pertaining to the interstate transportation and the sale of "intoxicating liquors" apply only where there is an intent to violate the law of the state into which the "intoxicating liquor" is being transported, and [fol. 83] in the instant case the interstate sales and shipments of appellants' products are made only to dealers in West Virginia licensed by the State of West Virginia to receive and sell the same.

(d) Under the provisions of Chapter 60, Official Code of West Virginia, the prohibition laws of West Virginia apply only to non-resident sales when the products mentioned in said chapter are intended by any person interested therein

to be received, possessed, sold or in any manner used in violation of the prohibition laws of West Virginia. The provision in Section 11, Article 1, Chapter 60, Official Code of West Virginia that in the case of interstate sales the furnishing or delivery of the product sold shall be deemed to be made in the county where delivery is made to the consignee, his agent or employe, applies only where there is an intent to violate the laws of West Virginia, and in this case appellants have no such intent because they sell and transport their products in interstate commerce only to dealers in West Virginia licensed by that state to receive and sell the same.

(e) If under the federal statutes and laws, the State of West Virginia could pass a law affecting interstate commerce to the extent contended by the defendant State Prohibition Commissioner in this case, the State of West Virginia has not seen fit to avail itself of this power but has limited the application of the West Virginia prohibition laws to sales where there is an intent to violate the prohibition laws of West Virginia.

Philip C. Friese, Arthur G. Stone of Rummel, Blagg & Stone, Counsel for Appellants.

Designation of Parts of Record to be Printed

Appellants further state the entire record as filed in this court is to be printed by the clerk for the hearing of the case, which record is made up of the following papers:

The bill of complaint and exhibits filed therewith.

The answer and exhibits filed therewith.

[fols. 84 & 85] The affidavits of James M. Doran, G. F. Beyer, John W. Herscher, Robert B. Lewis, Ray Yancey, John Glassford, Willoughby N. McCormick, and the affidavit of T. A. Borradaile and exhibits filed therewith.

The order of submission.

The order denying the interlocutory injunction.

The order denying the permanent injunction.

The opinion of the Court.

The petition for appeal.

The assignments of error.

The order allowing appeal.

The appeal bond.

The waiver of citation of appeal.
Stipulation as to preparation of transcript of record.
Certificate of Clerk of District Court.

Philip C. Friese, Arthur G. Stone, of Rummel, Blagg & Stone, Counsel for Appellants.

A copy of this paper ("Statement of Points to be Relied Upon" and "Designation of Parts of Record to be Printed") was this day served upon the Appellees, W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, service of which is hereby acknowledged on their behalf this 7th day of January, 1932.

W. G. Brown, State Commissioner of Prohibition of State of West Virginia. H. B. Lee, Attorney General of State of West Virginia.

[fol. 86] [File endorsement omitted.]

Endorsed on cover: File No. 36,413. S. West Virginia D. C. U. S. Term No. 599. McCormick & Company, Inc., and Durham Bros., Inc., appellants, vs. W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, et al, etc. Filed December 29, 1931. File No. 36,413.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 599

McCORMICK & COMPANY, INC., a corporation, and DURHAM BROS., INC., a corporation,
Appellants,

v.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, and HOWARD B. LEE, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA,
Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL ON BEHALF OF APPELLANTS.

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 599

McCORMICK & COMPANY, INC., a corporation, and DURHAM BROS., INC., a corporation,
Appellants,

v.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, and HOWARD B. LEE, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA,
Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represent:

A.

Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 938 (28 U. S. C. A. §345) provides:

> "A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections, and not otherwise:
>
> * * * *
>
> "(3) Section 380 of this title."

Section 380 of the Act, referred to in the foregoing section, provides as follows:

> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of any statute of a state by restraining the action of any officer of such state in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any justice of the Supreme Court, or by any District Court of the United States, or by any judge thereof, or by any circuit judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges and unless a majority of said three judges shall concur in granting such application. * * * The requirement respecting the presence of three judges shall also apply to the

final hearing of such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

B.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 3rd of December, 1931. (R. 62).

The application for appeal was presented on the 21st day of December, 1931. (R. 73).

(NOTE: All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the United States District Court for the Southern District of West Virginia and on file with the Clerk of this Court. The record has not yet been printed.)

C.

Nature of Case and Rulings Below.

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by McCormick & Company, Inc., and Durham Brothers Company, Inc., who sue on behalf of themselves and certain other non-resident manufacturers and wholesale dealers in products used exclusively for medicinal, mechanical, toilet and culinary purposes, containing ethyl alcohol as a necessary solvent and preservative, against the appellees, W. G. Brown, Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia. (R. 2).

In this suit, the appellants, who hold permits, issued by the United States Bureau of Industrial Alcohol and approved by the United States Bureau of Prohibition, to manufacture and sell products containing ethyl alcohol, seek to restrain the appellees from requiring appellants to obtain permits from the State Prohibition Commissioner, and pay therefor an annual license fee, before being permitted to sell and ship their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell said products, and to enjoin the appellees from instituting actions to prevent or interfere with the sale of said products by appellants. (R. 9).

The defendant State Prohibition Commissioner bases his right to require said permits upon certain rules and regulations published and established by him, as such

State Prohibition Commissioner, and enforced by him and the defendant Attorney General under the alleged authority of Chapter 60 of the Official Code of West Virginia. (6, 27).

It is the contention of the appellants that the action of the State Prohibition Commissioner, in requiring them to secure said permits and pay an annual license fee therefor, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia, who are authorized by the State Prohibition Commissioner to receive, store and sell the same, constitutes an unlawful interference with interstate commerce, and violates the Commerce Clause of the Constitution of the United States. (R. 3).

The Judge of the District Court, in which the suit was pending, convened a three-judge court under §266 of the Judicial Code, as amended. (28 U. S. C. A. §380). This Court, upon hearing of the cause, held that the action of the defendant State Prohibition Commissioner in requiring said permits, was constitutional, denied an interlocutory and permanent injunction, and dismissed this suit. (R. 40, 62).

D.

Cases Believed to Sustain Jurisdiction.

1. Jurisdictional amount.

Southern Express Co. v. *Mayor etc., of Ensley*, 116 Fed. 756;
City of Hutchison v. *Beckham*, 118 Fed. 399;
Jewel Tea Co. v. *Lee's Summit, Mo.*, 198 Fed. 532;
Humes v. *City of Little Rock*, 138 Fed. 929;
Campbell Baking Co. v. *City of Maryville*, 31 Fed. (2d) 466;
Bitterman v. *Louisville & Nashville R. Co.*, 207 U. S. 205, 225, 52 L. Ed. 17.

2. Supreme Court Jurisdiction.

McCormick & Co. v. *Brown*, 52 Fed. (2d) 934;
Stratton v. *St. Louis S. W. R. Co.*, 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135;
Bowman v. *Chicago etc. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 799;
Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128;
Adams Express Co. v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267;
Gerber v. *Shoenfeld*, 43 Fed. (2d) 255;
New Jersey Bell Tel. Co. v. *State Board of Taxes and Assessment of the State of New Jersey*, 280 U. S. 338, 74 L. Ed. 463;
Sprout v. *South Bend*, 277 U. S. 115, 72 L. Ed. 833.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of §§238 and 266 of the Judicial Code as amended. (28 U. S. C. A. §§ 345 and 380.)

Respectfully submitted,

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for Appellants.

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CHARLES EL

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 599

McCORMICK & COMPANY, INC., AND DURHAM BROS., INC., *Appellants*,

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA ET AL., *Appellees*.

Brief on Behalf of Appellants, McCormick & Co., Inc., and Durham Bros. Co., Inc.

PHILIP C. FRIESE,
H. D. RUMMEL,
Counsel for Appellants.

[illegible] Printing Co., Law Printers, Charleston, W. Va.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 599

McCORMICK & COMPANY, INC., AND DURHAM BROS., INC., *Appellants,*

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA ET AL., *Appellees.*

Brief on Behalf of Appellants.

I.

THE OPINION OF THE COURT BELOW.

The opinion rendered in this case by the United States District Court for the Southern District of West Virginia has not been officially reported at the time of the preparation of this brief. The opinion, which was

rendered by a court of three judges convened pursuant to Section 266 of the Judicial Code, as amended, (28 USCA Section 380), appears on page 56 of the Record.

II.

JURISDICTION.

Appellants have complied with Paragraph 1 of Rule 12 of this Court, and have hereinbefore filed their printed statement showing jurisdiction. We rely upon that statement to sustain jurisdiction, and in addition thereto desire to make a further statement as to equity jurisdiction.

Appellees have not challenged the equity jurisdiction of the District Court. Appellants rely upon three grounds to establish equity jurisdiction:

(1) The enforcement of the unlawful and unconstitutional rules and regulations of the defendant prohibition commissioner would irreparably injure or destroy the interstate business of the appellants and those on whose behalf they sue. (R. 6, 43, 44)

(2) The absence of a remedy at law to recover the license taxes or fees, if paid. (R. 7.)

(3) The necessity of resorting to equity to avoid a multiplicity of suits. (R. 7, 8.)

STATEMENT OF FACTS.

This is a suit in equity brought in the United States District Court for the Southern District of West Virginia, by McCormick & Company, Inc., and Durham Brothers Company, Inc., who sue on behalf of themselves and certain other non-resident manufacturers and wholesale dealers in products sold exclusively for medicinal, mechanical, toilet and culinary purposes, containing ethyl alcohol as a necessary solvent and preservative, against the appellees, W. G. Brown, Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia. (R. 1, 37, 42, 47). The appellants, and those on whose behalf they sue, who hold permits, issued by the United States Bureau of Industrial Alcohol and approved by the United States Bureau of Prohibition, to manufacture and sell products containing ethyl alcohol, seek to restrain the appellees from requiring appellants to obtain permits from the State Prohibition Commissioner, and pay therefor an annual license fee of $50.00, before being permitted to sell and ship their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell said products, and to enjoin the appellees from instituting actions to prevent or interfere with the sale of said products by appellants. (R. 1, 4, 5, 7 and 8).

Under the rules and regulations of the defendant State Prohibition Commissioner, non-resident manufacturers doing business in West Virginia are classed and treated as wholesale dealers, (R. 27), and all non-

resident wholesale dealers are required to secure permits before being permitted to sell and transport their products in interstate commerce into West Virginia. (R. 26).

The defendant Prohibition Commissioner refuses to permit any resident dealer to purchase, sell or offer for sale any flavoring extracts, toilet articles, perfumes or other merchandise containing ethyl alcohol, when such products are manufactured or sold by any person or firm without the State of West Virginia, unless such person or firm has a permit issued by the Commissioner of Prohibition of West Virginia to manufacture or sell such articles. Furthermore, the State Prohibition Commissioner and his agents have threatened and do threaten to seize and confiscate any such articles which a resident dealer should buy, sell, or offer for sale, unless the manufacturers of said articles hold permits from the State Prohibition Commissioner. (R. 6, 43).

Affidavits submitted by appellants establish the fact that none of their products containing ethyl alcohol are fit for use or are capable of being used for beverage purposes. (R. 37, 42, 44, 45, 46). The appellees have introduced an affidavit to the effect that these products are such as will produce intoxication, and are intoxicating in fact (R. 48).

The defendant State Prohibition Commissioner bases his right to require appellants to secure said permits upon certain rules and regulations published and established by him, as such State Prohibition Commissioner, and enforced by him and the defendant Attorney Gen-

eral under the alleged authority of Chapter 60 of the 1931 Code of West Virginia. (R. 25, 26, 27).

It is the contention of the appellants that Chapter 60, 1931 Code of West Virginia, does not confer such authority and that the action of the State Prohibition Commissioner, in requiring them to secure said permits and pay an annual license fee therefor of $50.00, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia, who are authorized by the State Prohibition Commissioner to receive, store and sell the same, constitutes an unlawful interference with interstate commerce, and violates the commerce clause of the Constitution of the United States. (R. 7)

The Judge of the District Court in which the suit was pending convened a court of three judges, under the provisions of Section 266 of the Judicial Code, as amended, (28 USCA Section 380). The Court of three judges, upon the hearing of the cause, held that the action of the defendant State Prohibition Commissioner in requiring said permits, was constitutional, denied an interlocutory and permanent injunction, and dismissed this suit. (R. 54).

STATEMENT OF ISSUE.

The sole issue presented in this case is whether the defendant State Prohibition Commissioner, by the enforcement of certain rules and regulations prescribed by him under the alleged authority of Chapter 60,

1931 Code of West Virginia, can require the appellants and those on whose behalf they sue, to obtain permits from the State Prohibition Commissioner and pay therefor an annual license fee of $50.00, before being permitted to sell and ship their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell the same.

SPECIFICATIONS OF ERROR.

1. The district court erred in refusing to grant the prayer of appellants' bill of complaint for a permanent injunction.

2. The district court erred in refusing to enjoin the defendants, W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, from requiring or attempting to require by legal or equitable process, or otherwise, the appellants in this cause and those on whose behalf they sue, to secure permits from the appellee, W. G. Brown, Commissioner of the State of West Virginia, and to pay for said permits an annual license fee, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by the said State Prohibition Commissioner to sell said products.

3. The district court erred in refusing to hold that the action of the defendant, W. G. Brown, State Prohibition Commissioner of the State of West Virginia,

in requiring the appellants and those on whose behalf they sue, to secure from said State Prohibition Commissioner permits and pay therefor an annual license fee, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by said Prohibition Commissioner to sell said products, constitutes an unlawful interference with the interstate business of the appellants.

4. The district court erred in holding that under the provisions of the Wilson Act, Webb-Kenyon Act, Reed Amendment, the Eighteenth Amendment to the Constitution of the United States, Volstead Act, and Section 46, Article 6 of the Constitution of West Virginia, and Chapter 60, 1931 Code of West Virginia, the defendant W. G. Brown, State Prohibition Commissioner of West Virginia, was warranted in requiring the appellants and those on whose behalf they sue, to secure from said defendant Prohibition Commissioner annual permits and to pay therefor an annual license fee of $50,00, before being allowed to sell and transport their products in interstate commerce to dealers in West Virginia holding licenses from the defendant State Prohibition Commissioner to receive, store and sell the same.

OUTLINE OF ARGUMENT.

I. **History of Federal Legislation on the Interstate Transportation of Intoxicating Liquors.**

Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128.

27 USCA Sec. 121 (1931 Cumulative Supplement).

In re Rahrer, 140 U. S. 545, 35 L. Ed. 572.

Rhodes v. *Iowa*, 170 U. S. 412, 42 L. Ed. 1088.

27 USCA Sec. 122 (1931 Cumulative Supplement).

Adams Express Co. v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267.

27 USCA Sec. 123 (1931 Cumulative Supplement).

United States v. *Hill*, 248 U. S. 420, 63 L. Ed. 337.

Ex parte George Pratt, 83 W. Va. 51, 97 S. E. 301.

18th Amendment to the Constitution of the United States.

National Prohibition Cases, 253 U. S. 350, 64 L. Ed. 946.

27 USCA Secs. 4, 12, 13 and 52.

Pollard v. *Commonwealth*, 132 Va. 576, 110 S. E. 354.

II. Appellants' Products are Not "Intoxicating Liquors" Within the Meaning of the Federal Statutes Pertaining to the Interstate Transportation of "Intoxicating Liquors."

27 USCA Sec. 4.

27 USCA Sec. 13.

Sutherland, Statutory Construction (2d Ed.) Sec. 443.

Vane v. *Newcombe,* 132 U. S. 220, 33 L. Ed. 310.

Bailey v. *Clark,* 21 Wall. 284, 22 L. Ed. 651.

Johnson v. *So. Pkg. Co.,* 196 U. S. 1, 49 L. Ed. 363.

Monroe Cider, Vinegar & Fruit Co. v. *Riordan,* 280 Fed. 624 (C. C. A. 2d Ct.)

United States v. *Phez Co.,* 28 Fed. (2d) 106 (C. C. A. 9th. Ct.)

Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284.

III. The Webb-Kenyon Act Applies Only When There is an Intent to Violate the Laws of the State Into Which the Liquor is Being Transported.

Adams Express Co. v. *Kentucky,* 238 U. S. 190, 59 L. Ed. 1267.

Southern Express Co. v. *State,* 188 Ala. 454, 66 So. 115.

Palmer v. *Southern Express Co.*, 129 Tenn. 116, 165 S. W. 236.

Smith v. *Southern Express Company*, 166 N. C. 155, 82 S. E. 15.

Sturgeon v. *State*, 17 Ariz. 513, 154 Pac. 1050.

Van Winkle v. *State*, 4 Boyce (Del.) 578, 91 Atl. 385.

Chicago, B. & Q. R. Co. v. *Giles*, 235 Fed. 804.

Hamm Brewing Company v. *Chicago, R. I. & P. Ry. Co.*, 215 Fed. 672.

State v. *United States Express Co.*, 164 Iowa 112, 145 N. W. 451.

State v. *Doe*, 92 Kans. 212, 139 Pac. 1169.

United States v. *Oregon-Wash. R. & N. Co.*, 210 Fed. 378.

IV. The West Virginia Statutes Applicable to this Case Are Based Upon the Webb-Kenyon Act and Are to be Construed with Reference Thereto.

Secs. 1, 5 and 11, Art. 1, Ch. 60, 1931 Code of West Virginia.

Sec. 3, Art. 2, Ch. 60, 1931 Code of West Virginia.

V. The Products Sold and Shipped by the Appellants in Interstate Commerce to Licensed Dealers in West Virginia, Are Not "Liquors" with-

in the Meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia.

State v. *Miller*, 89 W. Va. 84, 108 S. E. 847.
Intoxicating Liquor Cases, 25 Kans. 751, 37 Am. Rep. 284.
Young v. *State*, 137 Miss. 188, 102 So. 161.
State v. *Muncey*, 28 W. Va. 494, (dissenting opinion).
State v. *Haymond*, 20 W. Va. 18.

VI. If the Webb-Kenyon Act be Held to be Repealed by Implication, West Virginia Statutes on the Importation of Intoxicating Liquors are Not Applicable to Appellants' Products Sold Only to Licensed Dealers in West Virginia.

Sec. 11, Art. 1, Ch. 60, 1931 Code of West Virginia.

VII. If the State of West Virginia, Under the Concurrent Power Clause of the 18th Amendment, Has the Authority to Forbid the Interstate Shipment into West Virginia of all Products Which the State Deems to be "Liquors", Regardless of the Absence of an Intent to Violate its Laws, the State of West Virginia Has Not Exercised that Authority.

Section 11, Article 1, Chapter 60, 1931 Code of West Virginia.

VIII. The Requirement of a Permit and the Exaction of the $50.00 Annual Permit Fee, as Applied to Non-Resident Dealers and Manufacturers, is an unlawful Burden on Interstate Commerce.

Bowman v. *Chicago, etc. Ry. Co.*, 125 U. S. 465, 31 L. Ed. 700.

Leisy v. *Hardin*, 135 U. S. 100, 34 L. Ed. 128.

Adams Express Company v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267.

New Jersey Bell Telephone Company v. *State Board of Taxes and Assessment of the State of N. J.*, 280 U. S. 338, 74 L. Ed. 463.

Gerber v. *Shoenfield*, 43 Fed. (2d) 225.

Sprout v. *South Bend*, 277 U. S. 163, 171, 72 L. Ed. 833, 837.

ARGUMENT

I. History of Federal Legislation on the Interstate Transportation of Intoxicating Liquors.

As heretofore indicated, the defendant State Prohibition Commissioner relies upon the provisions of Chapter 60, 1931 Code of West Virginia, (Appendices A and B of this brief), as the authority for his requirement that the appellees secure a permit and pay therefor an annual fee before being permitted to sell and transport their products in interstate commerce to licensed dealers in West Virginia. We do not believe that Chapter 60 can be so construed. Moreover, if it will admit of such a construction, it is unconstitutional as constituting an unlawful interference with interstate commerce.

A history of Federal legislation pertaining to the interstate transportation of *intoxicating liquors* affords considerable aid in interpretating the provisions of Chapter 60.

The first Federal statute on the subject was the Wilson Act passed by Congress on August 8, 1890. That act was as follows:

> "All fermented, distilled, or other intoxicating liquors transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory

enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

27 USCA Sec. 121 (1931 Cumulative Supplement).

The Wilson Act was passed by Congress to meet the decision in *Leisy* v. *Hardin,* 135 U. S. 100, in which this Court held that the State of Iowa, in the absence of congressional permission, had no authority to prohibit the sale of liquor in original packages in the hands of importers from other states in that state; and that as intoxicating liquors were recognized by Congress as legitimate articles of interstate commerce, such interstate traffic could not be controlled by the laws of the State amounting to the regulation thereof. This Court said that "the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restrictions upon the State in dealing with imported articles of trade within its limits which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action."

In the case of *In re Rahrer,* 140 U. S. 545, upholding the constitutionality of the Wilson Act, this Court said, "Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted

no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction."

In *Rhodes* v. *Iowa*, 170 U. S. 412, this Court held that the Wilson Act did not have the effect of permitting interstate shipments of liquor to come under the operation of the State laws until after their delivery to the consignee, and therefore one having received liquor shipped in interstate commerce obtained the right to use the same, although he no longer had the right to sell it free from the restrictions imposed by the laws of the State. To meet this situation, Congress, on March 1, 1913, passed the Webb-Kenyon Act, which reads as follows:

> "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place non-contiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United State, or place noncontiguous to but subject to the jurisdiction there-

of, is hereby prohibited."

27 USCA Sec. 122 (1931 Cumulative Supplement).

The Webb-Kenyon Act did not assume to deal with all interstate commerce shipments of intoxicating liquors in the States, but was only applicable to cases in which the intoxicating liquor was *intended* by any person interested therein to be received, sold or in any manner used, in the original package, or otherwise, in violation of any law of the State into which shipment was made. *Adams Express Company* v. *Kentucky*, 238 U. S. 190. In that case this Court said:

> "It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the state into which it is thus shipped or transported. Such shipments are prohibited only when such person interested intends that they shall be possessed, sold or used in violation of any law of the State wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments. Except as affected by the Wilson Act, which permits the state laws to operate upon liquors after termination of the transportation to the consignee, and the Webb-Kenyon Act, which prohibits the transportation of liquors into the state to be dealt with therein in violation of local law, the subject-matter of such interstate shipment is left untouched and remains within the sole jurisdiction of Congress under the Federal Constitution."

This Court concluded that inasmuch as the liquor in question was to be transported in interstate commerce for the personal use of the consignee, which use had been declared by the supreme court of Kentucky not to be in violation of the laws of Kentucky, the Webb-Kenyon Act had no application, and the state could not regulate such interstate shipment.

On March 4, 1917, Congress passed the Reed Amendment, which was as follows:

> "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be fined not more than $1,000 or imprisoned not more than six months, or both: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State; Provided further that the provisions of this section are made applicable to the District of Columbia."
>
> 27 USCA Sec. 123 (1931 Cumulative Supplement).

In *United States* v. *Hill*, 248 U. S. 420, sustaining the constitutionality of the Reed Amendment, this Court said, in part:

> "In view of the authority of Congress over the subject-matter, and the enactment of previous legislation embodied in the Wilson and Webb-Kenyon Laws, we have no question that Congress

> enacted this statute because of its belief that in States prohibiting the sale and manufacture of intoxicating liquors for beverage purposes the facilities of interstate commerce should be denied to the introduction of intoxicants by means of interstate commerce, except for the limited purposes permitted in the statute which have nothing to do with liquor when used as a beverage. That the State (West Virginia) saw fit to permit the introduction of liquor for personal use in limited quantity in nowise interferes with the authority of Congress, acting under its plenary power over interstate commerce, to make the prohibition against interstate shipment contained in this act. It may exert its authority, as in the Wilson and Webb-Kenyon Acts, having in view the laws of the State, but it has a power of its own, which in this instance it has exerted in accordance with its view of public policy. * * *"

It is quite generally held that the Reed Amendment did not repeal the Webb-Kenyon Act. *Ex Parte George Pratt*, 83 W. Va. 51, 97 S. E. 301; *Pollard* v. *Commonwealth*, 132 Va. 576, 110 S. E. 354.

The next Federal enactment on the subject of intoxicating liquors was the Eighteenth Amendment to the Constitution, which reads as follows:

> "Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> "Section 2. The Congress and the several

states shall have concurrent power to enforce this article by appropriate legislation."

The constitutionality of the 18th Amendment was upheld in the *National Prohibition Cases*, 253 U. S. 350.

On October 28, 1919, Congress passed the Volstead Act, Sections 12 and 52 of which read as follows:

> "That no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this chapter and all the provisions of this chapter shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> "Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided and the Commissioner may, upon application, issue permits therefor. * * *"
>
> 27 USCA Sec. 12.
>
> "All provisions of law that are inconsistent with this chapter are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquors, shall be construed as in addition to existing laws, * * *"
>
> 27 USCA Sec. 52.

Until the passage of the Volstead Act, there had been no definition of intoxicating liquor specifically written by Congress, although the term had been used in each

of the Congressional enactments bearing upon this subject. In the Volstead Act, however, Congress defined intoxicating liquor for the first time and in the following terms:

> "When used in this title (1) The word "liquor" or the phrase "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of 1 per centum or more of alcohol by volume which are fit for use for beverage purposes: * * *"

27 USCA Sec. 4.

It was further provided in Sec. 13 of the Volstead Act, that,

> "The articles enumerated in this section shall not after having been manufactured and prepared for market, be subject to the provisions of this chapter if they correspond with the following descriptions and limitations, namely:
>
> (*a*) Denatured alcohol or denatured rum produced and used as provided by laws and regulations now or hereafter in force.
>
> (*b*) Medicinal preparations manufactured in accordance with formulas prescribed by the United States Pharmacopœia, National Formulary or the American Institute of Homeopathy that are unfit for use for beverage purposes.
>
> (*c*) Patented, patent, and proprietary medicines that are unfit for use for beverage purposes.
>
> (*d*) Toilet, medicinal, and antiseptic preparations and solutions that are unfit for beverage purposes.

(*e*) Flavoring extracts and sirups that are unfit for use as a beverage, or for intoxicating beverage purposes.

(*f*) Vinegar and preserved sweet cider.

"A person who manufactures any of the articles mentioned in this section may purchase and possess liquor for that purpose, but he shall secure permits to manufacture such articles and to purchase such liquor, give the bonds, keep the records, and make the reports specified in this chapter and as directed by the commissioner. No such manufacturer shall sell, use or dispose of any liquor otherwise than as an ingredient of the articles authorized to be manufactured therefrom. No more alcohol shall be used in the manufacture of any extract, sirup, or the articles named in paragraphs b, c, and d of this section which may be used for beverage purposes than the quantity necessary for extraction or solution of the elements contained therein and for the preservation of the article.

"Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 46 of this chapter. * * *"

27 USCA Sec. 13.

In *Pollard* v. *Commonwealth*, 132 Va. 576, 110 S. E. 351, it was held that the Webb-Kenyon Act has not been repealed by the Eighteenth Amendment or Volstead Act. The Court said in this connection:

> "The object of the amendment (18th amendment) was not to curtail the powers of Congress, but to confer upon Congress powers which it did not theretofore possess; nor, as pointed out in the Allen Case, *supra*, was it the intention of the amendment to take away the police powers of the state over the subject of intoxicating liquor. So far as Congress was concerned, the amendment was a grant of power and not a restriction or a curtailment of existing powers. Prior to the amendment Congress had full power, under the commerce clause, to regulate or prohibit the transportation of intoxicating liquors in interstate commerce. This power it exercised by the Webb-Kenyon Act, which prohibited absolutely and entirely the transportation of ardent spirits into any state from a point without that state in violation of any law of said state * * *. This statute was enacted in aid of state statutes on prohibition, and enabled such states to absolutely prohibit the bringing into the state of intoxicating liquors for use therein. The power of Congress to regulate or prohibit the transportation of intoxicating liquors in interstate commerce was fully covered by the commerce clause of the Constitution, and that power was not taken away or curtailed by the 18th Amendment. There is nothing in that amendment which takes away from Congress the power to enact any statute deemed necessary to make prohibition effective, nor to prohibit the states from enacting such laws as may be necessary for the same purpose, provided only that the state laws do not affect offenses

against the United States created by act of Congress. The 10th Amendment of the United States Constitution expressly provides that: 'The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people.' So much of the Webb-Kenyon Act as is not in conflict with the Volstead Act is still kept in force by Section 35 of the Volstead Act (41 Stat. 317), declaring that: 'All provisions of the law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquors shall be construed as in addition to the existing laws.' Under the Webb-Kenyon Act, the state had ample power to prevent the importation of intoxicating liquor from without its borders * * *. This provision of that act is still in force, and consequently may still be taken advantage of by the state. Section 39 of the prohibition act of this state is not in conflict with the 18th Amendment or the Volstead Act, and is still in force."

II. Appellants' Products are Not "Intoxicating Liquors" Within the Meaning of the Federal Statutes Pertaining to the Interstate Transportation of "Intoxicating Liquors."

In construing the provisions of Chapter 60, 1931 Code of West Virginia, with reference to Federal legislation relating to the transportation of *intoxicating liquors*, one of the vital questions raised is whether under the laws of the United States, articles of merchandise made in accordance with Federal formulæ, and unfit for beverage purposes, are legitimate articles of com-

merce, or whether they are contraband articles, the interstate character of which has been divested by any act of the Federal Congress.

Assuming that the products manufactured by the appellants, and by those on whose behalf they sue, are legitimate articles of commerce and that they move in interstate commerce, subject to no special disabilities, there can be no question but that any regulation of any State officer, requiring a permit, or license, or certificate, or any fee to be paid in order that they may be sold in West Virginia, constitutes a burden upon interstate commerce and is unlawful. And, of course, any statute which authorizes a state officer to make any regulation requiring a permit, license, certificate or fee to be paid in order that they may be sold in West Virginia, is unconstitutional and void.

Bowman v. *Chicago, etc. Ry. Co.*, 125 U. S. 465, 8 S. C. 689, 31 L. Ed. 799.

Leisy v. *Hardin*, 135 U. S. 100, 10 S. C. 681, 34 L. Ed. 128.

Adams Express Company v. *Kentucky*, 238 U. S. 190, 59 L. Ed. 1267.

New Jersey Bell Telephone Company v. *State Board of Taxes and Assessment of the State of N. J.*, 280 U. S. 338, 74 L. Ed. 463, 50 S. C. 11.

Gerber v. *Shoenfield*, 43 Fed. (2d) 225.

We may then consider whether the products manufactured by the appellants, and those on whose behalf they sue, are legitimate articles of commerce, subject to no special disability.

The appellees have attempted to subject them to the same disability to which *intoxicating liquors* are amenable, by reason of Federal legislation bearing upon the traffic in *intoxicating liquors*. The only justification upon which the appellees can rely is that the products of the appellants are intoxicating liquors within the meaning of the laws of the United States. Obviously, the State of West Virginia can not legislate for Congress. Congress has seen fit to withdraw from the protection of the commerce clause of the Constitution certain products, to-wit, intoxicating liquors, and Congress has remanded the control of these products, after they enter a State, to the authority of the State, free from the protection normally afforded articles moving in interstate commerce. The State, however, can exercise its authority only with respect to articles from which Congress has withdrawn the protection of the commerce clause, and the State can not define the term "intoxicating liquors" so as to enlarge its scope and thereby attempt to regulate interstate commerce in articles over which Congress has not relinguished its exclusive authority. So, in order to determine whether the appellees, acting under the alleged authority of the State statutes of West Virginia, have the right to charge a fee and require the procuring of a license, certificate or permit by the appellants in order that the appellants may sell their products interstate in West Virginia, it must appear that the products of the appellants are intoxicating liquors within the meaning of the laws of the United States.

The term "intoxicating liquor" as used in Federal statutes enacted prior to the passage of the Volstead

Act must be defined in the light of the definition as used by Congress in the Volstead Act.

> "All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act."
>
> *Sutherland, Statutory Construction* (2d Ed.) Sec. 443.
>
> In accord: *Vane* v. *Newcombe,* 132 U. S. 220.
>
> *Bailey* v. *Clark,* 21 Wall. 284.
>
> *Johnson* v. *So. Pkg. Co.,* 196 U. S. 1.
>
> *Monroe Cider, Vinegar & Fruit Co.* v. *Riordan,* 280 Fed. 624 (C. C. A. 2d Ct.)
>
> *U. S.* v. *Phez Co.,* 28 F. (2d) 106 (C. C. A. 9th Ct.)

The above consideration determines the question as to the meaning of the term "intoxicating liquors" as used in the various Federal enactments relating to intoxicating liquor prior to the Volstead Act. The Volstead Act, by its very terms (27 USCA Sec. 13), provides that flavoring extracts, medical preparations, proprietary medicines and the like are not intoxicating liquors. However, the term "intoxicating liquors" has been subjected to judicial determination in a number of decisions. In the *Intoxicating Liquor Cases,* decided in 25 Kansas 751, 37 Am. Rep. 284, Justice Brewer had before him the statute of Kansas prohibiting the sale and manufacture of any "spirituous, malt, vinous, fermented or other intoxicating liquors" and "all other liquors or mixtures thereof, by whatever name called,

that will produce intoxication." Various defendants were being prosecuted for the sale of flavoring extracts, perfumes and the like by virtue of this statute. The Court held:

> "The section, whose language is unfortunately chosen, is the one which has provoked this litigation and has tended to create so much prejudice against the statute; for its letter reaches to preparations which no man can believe were within the intent of the legislators, and interference with whose sale, if within the power of the legislature, would be felt by every one to be unnecessary and unreasonable. Alcohol is the intoxicating principle, the basis of all intoxicating drinks. Whatever contains alcohol will, if a sufficient quantity be taken, produce intoxication. Hence, whatever liquor contains alcohol is within the statute. So reads its letter. But when we come to inquire as to the liquors which contain alcohol, we find a lengthy list of fluids which are never used as beverages. Cologne, extract of lemon, bay rum, paregoric, tincture of gentian and many other medicinal preparations contain alcohol, and will produce intoxication. They are seldom used as a beverage, and yet they may be. Intoxication produced by drinking bay rum has been known. Yet few will drink it. Its uses are for the toilet. But three of the prosecutions before us are for the sale of bay rum, extract of lemon and tincture of gentian, respectively * * *. Now what was the evil sought to be remedied by this statute and the constitutional amendment of which it was the outgrowth? It was the use of intoxicating liquors as a beverage. As counsel for defendants aptly and forcibly express it, 'the movement, of which the amendment and the statute were the expression and the result, was not

> a crusade against cologne and extract of lemon' * * * it was no attack on bay rum, camphor or tincture of lemon; it was intended to strike at certain liquors and mixtures only as were in ordinary and known use as intoxicating beverages, or which, in the failure to obtain such beverages, it could be reasonably and fairly believed would be used as substitutes. It seems that this intent and object of the law must be taken into consideration as an important element in its construction, and while some particular preparation or patent medicine might possibly, in a few cases, with a few exceptional constitutions, produce effects similar to intoxication—at an enormous risk of the health or life perhaps—the real question and test to which each 'liquor' or 'mixture' is to be submitted is about this: 'Is there a reasonable danger that this will be used as or as an equivalent substitute for an intoxicating beverage?' The law should receive a reasonable construction equally removed, on the one hand, from a fanatical coloring, and on the other hand, from a tendency to fritter it away'."

The Court in this case went on to declare that only articles which can normally be used as intoxicating liquors, and are fit for beverage purposes, were referred to in the statute, and held that extract of lemon, cologne, bay rum and the like were not intoxicating liquors within the meaning of that law.

The opinion is quoted at length because of the eminence of Justice Brewer, and because of the clear and forceful reasoning employed on a problem very similar to that which is now before this Court.

There have been no cases decided wherein the court

has undertaken to say whether such products as those manufactured and sold by the appellants are intoxicating liquors within the meaning of the acts of Congress prior to the Volstead Act. All of the cases concerning the Wilson Act, the Webb-Kenyon Act and the Reed Amendment involved the sale of beverage liquor, such as whiskey, wine, gin and beer. There has never before been an attempt on the part of a State to tax and regulate non-resident manufacturers and wholesalers dealers in flavoring extracts, medicines, perfumes, etc. The fact that there has never been such a case as the one before this Court would seem of itself to indicate the construction which has heretofore been given these liquor statutes.

Some exceedingly significant remarks have, however, been made by the Federal Courts in dealing with the Wilson Act and the Webb-Kenyon Act.

In the case of *State of West Virginia* v. *Adams Express Co.*, 219 Fed. 794, it was held:

> "That Congress has power to outlaw and exclude absolutely or conditionally, from interstate commerce, intoxicating liquors or any other deleterious substance has very often been decided. * * * The distinction is between things *deleterious* and things *beneficial* or *innocuous*. The power to regulate is the power to make reasonable regulations, or restrictions or exclusions. The power to exclude intoxicants absolutely or conditionally does not import the power to exclude sound wheat." (Italics ours.)

The action of the State Prohibition Commissioner, in requiring non-resident firms to secure liquor dealers'

licenses as a prerequisite to shipping their products into West Virginia in interstate commerce is an unlawful burden on interstate commerce; and if the necessary construction of any West Virginia statute requires the State Prohibition Commissioner to exact such liquor dealer's license from non-resident firms, then that statute is unconstitutional and void. The sole power which a state might have to regulate or exclude any merchandise shipped in interstate commerce, must of necessity, be based upon a Federal statute granting it that right. The only statutes which could possibly apply to this case would be the statutes relating to the traffic in intoxivating liquors, and the term "intoxicating liquors" as used in these statutes can not be construed as including flavoring extracts, perfumes, and medicinal preparations such as the appellants wish to ship into West Virginia.

There being no Federal definition of intoxicating liquors broad enough to include such products, and there being on the other hand, in Section 4 of the Volstead Act, (27 USCA Sec. 4) a definition of intoxicating liquors specifically excepting articles not fit for beverage purposes, and there being in Section 13, (27 USCA Sec. 13) of the Volstead Act, a further provision excepting by name, flavoring extracts, toilet preparations and the like, which are made in accordance with approved formulæ, and unfit for beverage purposes, we therefore assert that there is no authority to be found in the statutes of the United States which would permit a state to exclude from, or regulate interstate commerce in the products of the appellants. The affidavits of appellants show that their products are *unfit for beverage purposes,*

and the affidavit filed by the appellees does not deny this fact. (R. 37, 42, 44, 45, 46, 48)

Chapter 60 of the 1931 Code of West Virginia, provides that all manufacturers, wholesalers and dealers in "liquors" as defined by that statute, must secure licenses from the State Prohibition Commissioner before dealing in their products in West Virginia. This can only be construed to require such manufacturers and dealers as are within the jurisdiction of the state, to secure such permits; because, were the statute to be given any broader construction, it would be clearly unconstitutional as authorizing a restraint upon interstate commerce. For the definition of a term used in a Federal statute, we must construe that and other Federal statutes on the same subject-matter. A state has no power to extend the scope of Federal legislation either under the guise of a definition or in any other way. The action of the State Prohibition Commissioner thus exceeds any authority which any state statute of West Virginia could give him, and amounts to an unlawful and unwarranted interference with commerce between the states.

III. The Webb-Kenyon Act Applies Only Where There is an Intent to Violate the Laws of the State Into Which the Intoxicating Liquor is Being Transported.

Assuming that the products sold and shipped by the appellants in interstate commerce to licensed dealers in West Virginia are *intoxicating liquors* within the meaning of the federal laws pertaining to the interstate trans-

portation of *intoxicating liquors*, there is no Federal statute or law which can be said to take away from the products of the appellants the protection afforded by the commerce clause of the United States Constitution. The Webb-Kenyon Act is the only one of the Federal statutes or laws enacted prior to the 18th Amendment which could possibly be construed to have that effect. And that statute is only applicable when there is an *intent* upon the part of someone interested in the *intoxicating liquors* that they shall be received, sold or used in violation of the state law into which the shipments are being made. No such intent can be imputed to the appellants.

The leading authority as to the effect of the Webb-Kenyon Act upon interstate shipments of intoxicating liquor is *Adams Express Company* v. *Kentucky*, 238 U. S. 190, which has been cited and quoted in our discussion of Federal legislation. The interpretation there placed upon the act, that it only divests intoxicating liquors of their interstate character when the liquor is intended by any person interested therein to be possessed, sold or used in violation of the law of the State into which it is shipped or transported, has met with universal approval by the Federal and State courts which have considered the question.

In *Sturgeon* v. *State*, 17 Arizona 513, 154 Pac. 1050, the defendant, Sturgeon, was convicted upon a charge of bringing intoxicating liquors into the State of Arizona. Upon the trial of the case, the defendant sought to prove that he brought the liquor into the state for his personal use. The trial court refused to permit the in-

troduction of this evidence. In reversing the case, the Supreme Court of Arizona said:

> "It not being unlawful in the State of Arizona to have or personally use intoxicating liquors, its introduction into the State for personal use is not prohibited by the Webb-Kenyon Act, and the prohibition amendment, in so far as it attempts to interdict its shipment, transportation or introduction into the State for a lawful purpose is ineffectual as an attempt to regulate interstate commerce. It follows that the lower court committed error in refusing appellee's offer of evidence to show that he had brought the liquor into the State for his own personal use."

In *Palmer* v. *Southern Express Company*, 129 Tenn. 116, 165 S. W. 236, the Supreme Court of Tennessee, in construing the Webb-Kenyon Act in conjunction with the State prohibition statutes of Tennessee, said:

> "It is perceived that the thing which the Act (Webb-Kenyon) prohibits is the interstate shipment or transportation of the liquors mentioned therein, when 'intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the State, etc., into which the shipment is made'. It is enough to say, for the disposition of the case before us, that it does not appear that the liquors shipped were intended to be sold, or used in violation of any law of the State; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill confessed by the demurrer, and agreed on the record at the hearing in the court below, that the liquors were purchased for the personal use of complain-

ant and his family. This was lawful and indeed permitted by the statute in question.

In *Van Winkle* v. *State*, 4 Boyce (Delaware) 578, 91 Atl. 385, the Supreme Court of Delaware held that the Webb-Kenyon Act does not divest intoxicating liquor of its interstate character in all cases, but removes the protection of the commerce clause only when the liquor is to be sold, used or possessed in violation of any law of the State into which it is shipped.

In *Southern Express Co.* v. *State*, 188 Ala. 454, 66 So. 115, the Supreme Court of Alabama said:

> "The above act, (Webb-Kenyon) by its terms, does not prohibit the transportation of intoxicating liquor from one state into another state except upon the contingency that the liquor is to be *received*, *possessed*, or *kept*, or in some way used in a manner prohibited by the laws of the state into which such liquor is to be, or is in fact, imported. The above act, by its terms, divests intoxicating liquor of its 'interstate character,' and withdraws from it 'interstate protection' at the hands of the federal government only when it is shipped from one state into another state for purposes, which, under a valid statute of the state into which it is shipped, are illegal in the state into which it is shipped. In other words, under the terms of the above quoted act, intoxicating liquor, as an article of interstate commerce, is not an outlaw. It is however, as such an article, under certain conditions, an outlaw."

In *Theo Hamm Brewing Co. v. Chicago, R. I. & P. Ry. Co.*, 215 Fed. 672, the Court said:

> "The Webb-Kenyon Law declares unlawful

the shipment of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state, into which it is shipped. The beer which Moss, a resident of Iowa, ordered from the Plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa. The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-Kenyon Law, while it says that the liquor must not be received, possessed, sold, or used in violation of law, does not say that it shall not be transported in violation of the law. If it has been the intention of Congress to prohibit the procurement from points outside of the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments.

"Assuming, as I do, that the law is valid, I hold that it does not apply to this case."

Additional decisions supporting the rule laid down in *Adams Express Co.* v. *Kentucky*, supra, are:

State v. *Doe*, 92 Kansas 212, 139 Pac. 1169.

Chicago, B. & Q. R. Co. v. *Giles*, 235 Fed. 804.

Smith v. *Southern Express Co.*, 166 N. C. 155,

82 S. E. 15.

State v. *United States Express Co.*, 164 Iowa 112, 145 N. W. 451.

United States v. *Oregon-Wash. R. & N. Co.*, 210 Fed. 378.

We have asserted that the products of the appellants are not "liquors" within the meaning of the Webb-Kenyon or any other Federal statute. But even if they were so considered, still the foregoing authorities demonstrate the inapplicability of the Webb-Kenyon Act to the products shipped by appellants in interstate commerce to dealers in West Virginia holding permits from the State Prohibition Commissioner authorizing the sale thereof. There being no intent by any one interested in the "liquors" to sell, use or possess the same in violation of the laws of the State of West Virginia, these products are legitimate articles of commerce. They are recognized as such by the National Prohibition Act. (R. 37, 42.) 27 USCA Secs. 4 and 13.

IV. The West Virginia Statutes applicable to this case are based upon the Webb-Kenyon Act and are to be construed with reference thereto.

The West Virginia laws and statutes applicable to this case are Section 46, Article 6, Constitution; Sections 1, 5 and 11, Article 1, and Section 3, Article 2, Chapter 60, 1931 Code of West Virginia. (Appendix A of this brief.)

The controlling statute pertaining to this case is section 11. It will be noted that the substance of Section

11 is quite similar to the language employed in the Webb-Kenyon Act. The italicized words "when *such liquors,* mixture, compound or preparation are *intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State*" are taken almost verbatim from the Webb-Kenyon Act. The entire West Virginia Code was re-enacted as of January 1, 1931.

The context of Section 11 is a clear legislative recognition that the Webb-Kenyon Act has not been repealed, and the expression of a legislative intent that the prohibition laws of West Virginia were only meant to include cases coming within the scope of that act, namely, where the non-resident dealer sells *liquors* to a person or firm in West Virginia, and such *liquors* are *intended* by any person interested therein to be received, sold, possessed or in any manner used in violation of the laws of West Virginia.

Therefore, even though the appellants' products were "liquors" or other preparations described in Section 11, the sales and shipments made in interstate commerce to licensed dealers in West Virginia would not come within the scope of this statute, because there is no *intent* to violate the West Virginia prohibition laws. To hold otherwise would be equivalent to saying that the Webb-Kenyon Act and this West Virginia statute patterned after that act, apply regardless of the *intent* to violate the West Virginia statutes.

It is interesting to note that in this section of the statute, non-resident vendors, dealers, etc., are specifically referred to, whereas in Section 5 of the statute

which requires the licensing of manufacturere, dealers, etc., selling exempted products in West Virginia, there is no reference to non-residents.

Counsel for appellees contend that the following statutes are also applicable, namely, Sections 4, 9 and 13, of Article 1, Chapter 60, 1931 Code of West Virginia. (Appendix B of this brief.)

Section 4 is applicable only to "liquors, or absinthe or any drink compounded with absinthe." It includes within its scope such *liquors* as whiskey, wine or beer or other *drinks* which cannot be sold under permit. The same is true of Section 9. This fact is recognized by the defendant, State Prohibition Commissioner, in his ruling issued on January 1, 1931. (R. 19). In referring to "Class A" (preparations that may not be sold under permit), the State Prohibition Commissioner states that " 'Class A' comprehends 'liquors' in the same legal sense as whiskey, wine or beer, and comes within the inhibition of Sections 4 and 9, Art. 1 of the Prohibition Law." (R. 22). The severity of the penalty prescribed for the violation of Section 4, is indicative that such was the legislative intent. It is clear that Sections 4 and 9 have no application to the present case.

Counsel for appellees rely upon that part of Sections 4 and 11, which provides that, "In case of such sale or furnishing in which a shipment or delivery of such liquor is made by a common carrier, or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein delivery thereof is made by such carrier." This clause was originally a part of what is now Section 4. It was omitted from that Sec-

tions 4 and 11 has the effect of making a point within sion of the Code. It is contended that this part of Sections 4 and 11 has the effect of making a point within West Virginia the place of the sale of appellants' products. *State of West Virginia* v. *Adams Express* Company, 219 Fed. 794, (Cir. Ct. App., 4th Cir.), is cited in support of this contention.

The *Adams Express Company Case* is readily distinguishable from the one at bar. In that case the court had under consideration what is now Section 4, Article 1, Chapter 60, 1931 Code. (*Section 11 was not then a part of the Code.*) But the *liquor* therein involved—beer—was a liquor within the scope of Section 4. In that case the Express Company contended that as the beer was intended for the personal use of the consignee, and as the West Virginia statute did not prohibit the personal use of liquor, the Webb-Kenyon Act was inapplicable, and therefore, the State could not interfere with the interstate shipment. The Circuit Court of Appeals for the Fourth Circuit held that as the Webb-Kenyon Act prohibited the shipment or transportation of *liquor* from one state into another, not only when it was intended to be sold or used in violation of any law of such state, but also when it was to be *received* or *possessed* in violation of the state law; and, as the state law prohibited the receipt or delivery of the *liquor*, the shipment came within the scope of the Webb-Kenyon Act. The court held further that as there was an *intent* to *receive* the *liquor* contrary to the laws of West Virginia, that part of what is now Section 4, making the place of delivery the place of sale, was applicable. It is worthy of note that the two decisions cited by the

Correction to be made on page 39 of brief for appellants. Line 1 from top for, "tions 4 and 11 has the effect of making a point within sion of the Code", read, "tion prior to 1923, but was restored by the 1931 Code".

court to sustain this last holding, namely, *State* v. *Herring*, 145 N. C. 418, 58 S. E. 1007, and *State* v. *Patterson*, 134 N. C. 612, 47 S. E. 808, were both cases involving intrastate shipments. It is clear from this decision that before such a statute making the place of delivery the place of sale can be held applicable there must be an intent to violate the laws of the state into which the shipments are being made. If this were not so the decision of the Circuit Court of Appeals would be in conflict with that of this Court in *Adams Express Co.* v. *Kentucky*, 238 U. S. 109, cited and quoted, supra. In that case the sale of *intoxicating liquors* was prohibited in Kentucky, and the statute of Kentucky provided that the place of delivery of intoxicating liquors should be the place of sale. The shipment was made from Tennessee into Kentucky. This Court impliedly held that this statutory provision was inapplicable in view of the fact that the liquor was transported for personal use, which was not at that time prohibited by the Kentucky law.

Counsel for appellees contend that in *Clark Distilling Company* v. *Western Maryland Ry. Co.*, 242 U. S. 311, this Court refused to follow its holding in the *Adams Express Company Case*, to the effect that before the West Virginia statute making the place of delivery the place of sale can be made applicable there must be an intent to violate the laws of West Virginia. It will be observed that at the date of the decision in the *Clark Distilling Company Case* the West Virginia statute had been amended so that the receipt of liquor for personal use was expressly forbidden. This Court said in that connection: "As the relief sought is the

permanent right to ship into the state, the meaning of the statute now, that is, as amended, is the test by which we must consider the questions requiring solution." This decision must be read in the light of that fact. It is true that this Court said that the Webb-Kenyon Act must be deemed to be applicable whether or not the state expressly forbade the individual use of liquor. This part of the decision was based upon the theory that as the state statute prohibited the *receipt* and *possession* of *liquor*, and as the Webb-Kenyon Act applied to shipments the *receipt* and delivery of which were barred by the state, the act was applicable to that case regardless of the use to be made of the *liquor*.

The contention of the appellees that the latter part of Section 11 (Section 4 is not applicable to this case) making the place of delivery the place of sale, applies, regardless of the intent of the appellants to sell and transport their products only to dealers in West Virginia holding permits from the State Prohibition Commissioner to receive, sell and possess the same, is, therefore, clearly untenable. It is only when there is an *intent* to violate the laws of West Virginia that this provision of Section 11 can be given effect. The wording of this section indicates that such was the legislative intent.

Section 13, Article 1, Chapter 60, 1931 Code of West Virginia, (Appendix B of this brief), is inapplicable to this case because the resident dealers to whom appellants sell their products are authorized to receive them.

V. The Products Sold and Shipped by the Appellants in Interstate Commerce to Licensed Dealers in West Virginia, Are Not "Liquors" Within the Meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia.

As the appellants only ship their products in interstate commerce to *licensed dealers* in West Virginia authorized by the State Prohibition Department to receive, store and sell the same, there is, of course, no intent upon the part of the appellants to violate the laws of West Virginia. It becomes apparent, therefore, that the question as to whether these products are "liquors" within the meaning of Section 1, Article 1, Chapter 60, 1931 Code of West Virginia (Appendix A of this brief), is not a controlling factor in this case. It is clear, however, that appellants' products are not "liquors" within the meaning of that section.

Section 1 refers to *beverages* that will produce intoxication.

State v. *Miller,* 89 W. Va. 84, 108 S. E. 847.
Intoxicating Liquor Cases, 25 Kans. 751, 37.
Young v. *State,* 137 Miss. 496, 102 So. 161).
State v. *Muncey,* 28 W. Va. 494, (dissenting opinion).
State v. *Haymond,* 20 W. Va. 18.

In *State* v. *Muncey,* 28 W. Va. 494, a conviction for the sale of the essence of cinnamon without a state license was upheld. However, the conviction was affirmed by a divided court, two of the judges being for affirm-

ance and two for reversal. In a very persuasive dissenting opinion, Judge Woods said in part:

> "There is nothing in the legislative history of Virginia or of this State to indicate that essence of cinnamon, or any of essences, extracts or tinctures known to pharmacists, have ever been regarded as a drink of any kind, or that the same was ever supposed to be included in any of the drinks, for the sale of which a State license was ever required."

And in *State* v. *Haymond,* 20 W. Va. 18, the court in reversing a conviction based on the sale of gum-camphor, said:

> "It is certainly the evil of tippling that is designed to be prevented by our act, under which the indictment in this case was found. It was never before suggested to my mind, that the sale by a druggist of gum-camphor and alcohol mixed by him could in any way promote tippling. In almost every home will be found the 'camphor-bottle' containing gum-camphor dissolved in distilled spirits, and used exclusively as a medicine, and kept ready for use when needed, *but unpalatable as a beverage,* and never used as such. It certainly was never designed by the legislature to prohibit the sale of such mixture by the statute under which the indictment in this case was found." (Italics ours).

In *State* v. *Miller,* 89 W. Va. 84, 108 S. E. 847, the Supreme Court of West Virginia said:

> "The word liquors used in the prohibition statutes has a well defined significance. Section one defines the term, and it says just what it means

> when used in that law. No matter what the word may signify in other connections, its meaning in the prohibition laws is clearly and definitely determined to inhibit the manufacture and sale of a number of different *beverages*, and for convenience adopted one term which included all or any of them, and this is the use made of the word liquors in the law, so that when the word liquors is used it is limited in its meaning to the things mentioned in section one. By the very terms of section one it cannot be given any broader or narrower meanings." (Italics ours).

The affidavits introduced on behalf of the appellants establish the fact that their products are unfit for *beverage* purposes and that they will not produce intoxication. (R. 37, 42, 44, 45, 46). The only affidavit offered by the appellees states that some of these products will produce intoxication, but the affiant does not say that any of these products are fit for *beverage* purposes. (R. 48)

It follows, therefore, that the products of the appellants are not "liquors" within the meaning of said Section 1; and that the action of the State Prohibition Commissioner in requiring the appellants to secure state permits before selling and shipping their products in interstate commerce to licensed dealers in West Virginia, constitutes an unlawful interference with interstate commerce.

VI. If the Webb-Kenyon Act Be Held to be Repealed by Implication, West Virginia Statutes Pertaining to the Interstate Sale and Shipment of "Liquors" are Not Applicable to Appellants' Products sold Only to Licensed Dealers in West Virginia.

It is our contention that the 18th Amendment did not repeal the Wilson Act, Webb-Kenyon Act or Reed Amendment, and that the concurrent power conferred upon the States to enforce the 18th Amendment was not intended to give the States any jurisdiction over the interstate transportation of *intoxicating liquors* in addition to or different from that conferred by the Webb-Kenyon Act. This has been recognized by Congress in the enactment of the Volstead Law (27 USCA Section 52), and by the Legislature of West Virginia in the enactment of its prohibition statutes, particularly Section 11, Article 1, Chapter 60, 1931 Code of West Virginia.

Counsel for appellants rely upon *United States* v. *Lanza*, 260 U. S. 377, as establishing a contrary proposition. In the *Lanza* Case this Court held that the Federal prohibition laws had not taken from the states their inherent right to legislate in a manner not conflicting with Federal legislation enacted to enforce the 18th Amendment, and further that a single act violative of both Federal and state prohibition laws could be an offense against each. The right of a state to interfere with interstate commerce was not involved in that case. The same is true of *Vigliotti* v. *Pennsylvania*, 258 U. S.

403; *Commonwealth* v. *Nickerson*, 236 Mass. 281, 128 N. E. 273; *Woods* v. *Seattle*, 270 Fed. 315, and similar cases relied upon by appellees.

There can be no doubt that a state may, in enforcing the 18th Amendment, enact such laws *effective within its own territory* as can be reasonably interpreted to aid such enforcement, and that in so doing the State may legislate more drastically than Congress. It may be possible, therefore, that in the exercise of this concurrent power the State of West Virginia can regulate and restrict *within its own borders* the sale of any commodity which it deems to be an intoxicating liquor. But we earnestly submit that the right of the state to interfere with the *interstate* transportation of *intoxicating liquors*, or that which it deems to be an intoxicating liquor, is still a restricted one. The State of West Virginia has no authority to interfere with interstate commerce in that which is not an *intoxicating liquor* within the meaning of the Federal laws pertaining to the interstate transportation of such liquors and the federal laws passed by Congress to enforce the 18th Amendment. And such federal laws apply only to intoxicating liquors which are to be sold and used for *beverage* purposes contrary to the laws of the state into which they are being shipped. The products sold and shipped by appellants to licensed dealers in West Virginia are not intoxicating beverages and are not intended to be sold or used contrary to the laws of West Virginia.

VII. If the State of West Virginia, Under the Concurrent Power Clause of the 18th Amendment, has the Authority to Forbid the Interstate Shipment into West Virginia of all Products Which the State Deems to be "Liquors", Regardless of the Absence of an Intent to Violate Its Laws, the State of West Virginia Has Not Exercised that Authority.

There is one proposition which is alone decisive of this case. For, if it should be held that the 18th Amendment repealed the Webb-Kenyon Act, that under the concurrent power clause of the Amendment the State of West Virginia has authority to forbid all interstate sales and shipments of what the State deems to be "liquors", regardless of the absence of an intent to violate the State laws, and that the products of the appellants and those on whose behalf they sue are "liquors" within the meaning of the West Virginia statutes, *the Legislature of West Virginia has not exercised that power.*

As heretofore indicated, the State Legislature, in enacting Section 11, Article 1, Chapter 60, 1931 Code of West Virginia, (the controlling statute applicable to this case), has adopted almost verbatim the material portions of the Webb-Kenyon Act, with the exception that the place of delivery of such "liquors" is designated as the place of sale. We have shown in our discussion of the Webb-Kenyon Act that this statutory provision making the place of delivery the place of sale is only applicable when there is an *intent* that the *liquors*

transported into West Virginia shall be received, sold or used in violation of the state law. There is no such *intent* upon the part of the appellants in the instant case because they only sell and transport their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition Commissioner to receive, store and sell the same.

VIII. The Requirement of a Permit and the Exaction of the $50.00 Annual Permit Fee, as Applied to Non-Resident Dealers and Manufacturers, is an Unlawful Burden on Interstate Commerce.

We believe we have shown that the products sold and transported by appellants in interstate commerce to licensed dealers in West Virginia are recognized as legitimate articles of commerce by both the Federal and State laws pertaining thereto, and that any West Virginia statute which could be construed to destroy the legitimacy of such products as articles of interstate commerce would be unconstitutional. It follows, therefore, that the action of the State Prohibition Commissioner, in requiring the appellants and those on whose behalf they sue to secure permits and pay therefor an annual license fee of $50.00, before being permitted to sell and transport their products in interstate commerce to dealers in West Virginia licensed by the State Prohibition to receive, store and sell the same, constitutes an unlawful interference with interstate commerce.

Bowman v. *Chicago, &c. Ry. Co.*, 125 U. S. 465.

Leisy v. *Hardin*, 135 U. S. 100.
Adams Express Co. v. *Kentucky*, 238 U. S. 190.
Gerber v. *Shoenfield*, 43 Fed. (2d) 225.
New Jersey Bell Telephone Co. v. *State Board of Taxes and Assessment of the State of New Jersey*, 280 U. S. 338.
Sprout v. *South Bend*, 277 U. S. 115.

The decree of the District Court, entered on December 3, 1931, should be reversed, with directions to enter a decree granting a permanent injunction as prayed for in the appellants' bill of complaint.

Respectfully submitted,

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Appellants.

April 2, 1932.

APPENDIX A.

Sec. 46, Art. 6, Constitution of West Virginia:

"On and after the first day of July, One Thousand Nine Hundred and Fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state; *Provided, however*, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes may be permitted under such regulations as the legislature may prescribe. The legislature shall, without delay, enact such laws, with regulations, conditions, securities and penalties as may be necessary to carry into effect the provisions of this section."

Sec. 1, Art. 1, Ch. 60, 1931, Code of West Virginia:

"The word 'liquors,' as used in this chapter, shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this chapter; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing one-half of one per cent or more of alcohol, by volume, shall be deemed spirituous liquors, and all shall be

embraced in the word 'liquors,' as used in this chapter."

Sec. 5, Art. 1, Ch. 60, 1931, Code of West Virginia:

"The provisions of this chapter shall not be construed to prevent any one from manufacturing (other than by 'moonshine still'), from fruit grown exclusively in this State, non-intoxicating wine for his own domestic consumption; or to prevent the manufacture from fruit grown exclusively within this State of vinegar and non-intoxicating cider for use or sale; or to prevent the manufacture and sale of pure grain alcohol, at wholesale, to druggists, hospitals, sanitariums, laboratories and manufacturers for medicinal, pharmaceutical, scientific and mechanical purposes, or of wine for sacramental purposes by religious bodies or to prevent the sale and keeping and storing for sale by druggists of wine for sacramental purposes by religious bodies, or any United States pharmacopœia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law; or to prevent the sale by druggists, through pharmacists, of pure grain alcohol for medicinal, scientific, pharmaceutical and mechanical purposes; or to prevent the use of such alcohol by physicians, dentists and veterinarians in the practice of their profession; or to prevent the medication and sale of pure grain alcohol according to formulæ and under regulations of the national prohibition act; or to prevent the purchase and use in the manufacture of medicinal preparations and compounds by wholesale druggists only of sherry wine in quantities not exceeding twenty-five wine gallons during any period of ninety days: *Provided*, That no one shall manu-

facture, sell, keep for sale, purchase or transport any liquors, as defined in section one of this article and as herein excepted, without first obtaining a permit from the commissioner of prop hibition so to do. Forms of application and permits shall be prepared by the commissioner and a fee for each permit issued shall be collected by him as follows:

"(*a*) All manufacturers of liquors and wholesale dealers therein shall pay a fee of fifty dollars for each permit; (*b*) all purchasers in wholesale quantities of ethyl alcohol in any form, whether pure, medicated, or denatured, for use as herein provided, shall pay a fee of ten dollars for each permit; (*c*) all purchasers in wholesale quantities of liquors as defined in section one of this article for sale at retail, except duly licensed druggists, shall pay a fee of two dollars for each permit; (*d*) all persons except duly licensed druggists registering stills and given permits to use the same for lawful purposes shall pay a fee of five dollars for each permit: *Provided,* That any still used only for the manufacture of chemicals including water in which the process of distillation is a common and necessary operation, and which still shall not be used for the distillation of ethyl alcohol in any form, shall be required to be registered, but the owner and operator thereof shall not be required to obtain a permit therefor, or to pay license tax thereon. No fee shall be required for a permit to obtain wine for sacramental or religious rites.

"Permits shall be issued for the calendar year and shall expire on the thirty-first day of December next following the issuance thereof. All moneys received by the commissioner under this

section shall belong to the State and shall be by him immediately paid into the state treasury: *Provided further,* That such liquors shall be manufactured, sold, kept for sale, transported and used under permits issued by the federal prohibition commissioner and in accordance with regulations issued in pursuance of the national prohibition act."

Sec. 11, Art. 1, Ch. 60, 1931, Code of West Virginia:

"It shall be unlawful for any railroad company, express company, aerial navigation company, bus company, taxi company, or any common carrier, or any officer, agent or employee of any of them, or any other person, to knowingly ship, carry, transport into, or deliver in this State, in any manner or by any means whatsoever, any malt, brewed, vinous or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to any person, corporation or firm within the territory of this State when such liquors, mixture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State.

"It shall be unlawful for any person, association or corporation to order, purchase, sell or cause any malt, brewed, vinous or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to be transported into this State or from one place to another within the State, when such liquors, mix-

ture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State.

"It shall be unlawful for any non-resident vendor, dealer or other person to sell or furnish any malt, brewed, vinous, or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to any person, corporation or firm within the territory of this State, when such liquors, mixture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State; and in case of such sale or furnishing in which a shipment or delivery of such liquors is made by a common or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee.

"Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than fifty nor more than three hundred dollars for the first offense, and for the second or any subsequent offense he shall be fined not less than one hundred nor more than five hundred dollars and confined in jail not less than two nor more than six months."

Sec. 3, Art. 2, Ch. 60, 1931 Code of West Virginia:

"The manufacture of alcohol, wine, and other

liquors, and the sale of the same by the manufacturer, by wholesale druggists and other dealers shall be under the supervision of the commissioner and under such rules and regulations as he may from time to time prescribe."

APPENDIX B.

Sec. 4, Art. 1, Ch. 60, 1931 Code of West Virginia:

Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall sell, keep, store, offer, or expose for sale, or solicit or receive orders for, any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder and, upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, and imprisoned in the county jail not less than two nor more than six months; and upon conviction of the same person for the second or any subsequent offense under this chapter, he shall be guilty of a felony and be confined in the penitentiary not less than one nor more than five years. Any person, except a common carrier, who shall act as the agent or employee of such seller, or person so keeping, storing, offering or exposing for sale such liquors, or act as the agent, or employes of the purchaser of such liquors, shall be deemed guilty of such selling, keeping, storing, offering or exposing for sale, as the case may be; and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

REVISERS' NOTE—The clause relative to the place of sale on delivery by a carrier is new.

Sec. 9, Art. 1, Ch. 60, 1931 Code of West Virginia:

"It shall be unlawful for any person to keep or have, for personal use or otherwise, or to use, or permit another to have, keep or use, intoxicating liquors at any restaurant, store, office building, club, place where soft drinks are sold (except a drug store may have and sell alcohol and wine as provided by section five of this article), fruit stands, news stands, room or place where bowling alleys, billiard or pool tables are maintained, livery stable, boat house, public building, park, road, street or alley. It shall also be unlawful for any person to give or furnish to another intoxicating liquors, except as otherwise hereinafter provided in this section. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one hundred nor more than five hundred dollars, and be imprisoned in the county jail not less than two nor more than six months; *Provided, however,* That nothing contained in this section shall prevent one, in his home, from having and there giving intoxicating liquors, lawfully acquired, to another who is not a minor, or a person of intemperate habits, or one who is addicted to the use of any narcotic drug, when such having or giving is in no way a shift, scheme or device to evade the provisions of this chapter, but the word "home," as used herein, shall not be construed to be one's club, place of common resort, or room of a transient guest in a hotel or boarding house: *Provided,* further, That no common carrier, for hire, nor other person, for hire, or without hire, shall bring or carry into this State, or carry from

one place to another within this State, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five of this article: *And provided further,* That in case of search and seizure, the finding of any liquors shall be prima facie evidence that the same are being kept and stored for unlawful purposes."

Sec. 13, Art. 1, Ch. 60, 1931 Code of West Virginia:

"It shall be unlawful for any person in this State to receive, directly or indirectly, intoxicating liquors from a common or other carrier. It shall also be unlawful for any person in this State to possess intoxicating liquors, received directly or indirectly from a common or other carrier in this State. Any person violating this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than one hundred nor more than two hundred dollars, and in addition thereto may be imprisoned not more than three months: *Provided, however,* That druggists may receive and possess pure grain alcohol, wine, and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in section five of this article and section three, article two of this chapter."

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CHARLES ELMORE C

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Supreme Court of the United States

No. 599

McCORMICK & CO., INC., AND DURHAM BROS. CO., INC., *Appellants,*

vs.

W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA ET AL, *Appellees.*

BRIEF ON BEHALF OF APPELLEES

H. B. LEE, *Attorney General,*
R. DENNIS STEED, *Asst. Atty. General,*
W. G. BROWN,
Counsel for Appellees.

JARRETT PRINTING CO., CHARLESTON, W. VA.

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BRIEF ON BEHALF OF APPELLEES, W. G. BROWN, STATE COMMISSIONER OF PROHIBITION OF THE STATE OF WEST VIRGINIA, AND HOWARD B. LEE, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA.

HISTORY OF THE CASE.

This is a suit in equity in which Appellants presented their verified bill of complaint to Hon. George W. McClintic, Judge of the Southern District of West Virginia, on the 24th day of December, 1930, and were granted a temporary restraining order against Appellees, enjoining them from requiring permits from Appellants authorizing the sale and transportation into the State of West Virginia of all alcoholic products of said Appellants defined and classified as liquors under the laws of said State.

The district court ~~erred in refusing~~ refused to enjoin the defendants, W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, and Howard B. Lee, Attorney General of the State of West Virginia, from requiring, or attempting to require by legal or equitable process, or otherwise, the appellants in this cause and those on whose behalf they sue, to secure permits from the appellee, W. G. Brown, Commissioner of the State of West Virginia, and to pay for said permits.

STATEMENT OF ISSUE.

The issue presented by the pleadings in this case is whether the appellee, the State Commissioner of Prohibition of West Virginia, can, under the laws of the State, require appellants and other wholesale dealers in liquors as defined by the laws of said State to obtain permits for

the sale and transportation thereof before selling and transporting such products in West Virginia. Appellants assert the right to sell and transport these products in the State of West Virginia by virtue of federal permits to manufacture and sell certain alcoholic preparations, issued under the provisions of the National Prohibition Act, and urge the protection of the interstate commerce laws. Appellees deny that said federal permits authorize such sale and transportation of these alcoholic products denounced as liquors by the laws of West Virginia, and deny that same are legitimate articles of interstate commerce under the laws of said State; and insist that they can be lawfully sold and shipped into the State only under the laws and regulations of said State and for the uses and purposes authorized by said laws.

STATEMENT OF FACTS.

Appellees do not accept the "Statement of Facts" in brief of appellants, and respectfully submit the following:

The appellants are non-resident wholesale dealers in certain alcoholic preparations defined as "liquors" by the prohibition laws of West Virginia. (R. 27, 1st and 3rd Reg.) It is admitted in answer of appellees (R. 23) that appellants are holders of federal permits authorizing them under certain rules and regulations to manufacture, transport and sell certain products containing ethyl alcohol.

Under the rules and regulations prescribed by appellee, the State Commissioner of Prohibition of West Virginia, appellants as such wholesale dealers are required to obtain permits from said Commissioner authorizing them to sell and transport liquors, as defined by the prohibition laws of said State, for medicinal, scientific, pharmaceutical and mechanical purposes, before transporting and selling same in said State (R. 28, "Third-

Wholesale Dealer''), and to pay the fee of $50.00 for the calendar year (R. 33, ''Thirteenth - Fees Collected''). *Only such alcoholic products as are intoxicating in fact and ''which will produce intoxication,'' as determined by the Commissioner, and are placed in Class ''B'' and Class ''C'' in ''Ruling Number Five (R. 20), require permits for their transportation and sale in said State.*

No distinction is made between resident and non-resident dealers under the rules and regulations made and prescribed by appellee, State Commissioner of Prohibition (R. 27-35); and no permit is required by said Commissioner to purchase, sell or offer for sale any flavoring extracts, toilet articles, perfumes or other merchandise containing ethyl alcohol, unless and until such alcoholic preparation has been duly determined by said State Commissioner of Prohibition to be ''a liquid, mixture, or preparation which will produce intoxication,'' and has been placed in ''Class B'' (Sold by the Drug Trade only Under Permit), or in ''Class C'' (Sold by all dealers under permit), according to the latest Prohibition Department Ruling. (R. 19.)

Permits are required only of *resident* manufacturers, and non-resident manufacturers only as they transact business in the State as wholesale dealers.

The affidavit of T. A. Borradaile, Chemist, (R. 48) proves that certain of the alcoholic products of appellant, McCormick & Co., Inc., offered for sale in the State of West Virginia, and for which permit is required, will produce drunkenness and are intoxicating in fact. The affidavits of James M. Doran (R 37), G. F. Beyer (R. 42), Robert B. Lewis (R. 44), Ray Yancey (R. 45), and John Glassford (R. 44), do not controvert the statement of Chemist Borradaile. The affidavit of John W. Herscher (R. 43) is contradicted by Rules and Regulations of the Commissioner (R. 27).

The affidavit of Willoughby M. McCormick (R. 48) does not show the value of the alcoholic products sold in the State of West Virginia *under permit*. The amount of $13,000 includes sales of all alcoholic preparations by said appellant, the greater portion of which is not under permit.

OUTLINE OF ARGUMENT.

I. Under its police power the State has always had the authority to regulate or prohibit the traffic in liquors, subject to the limitations of interstate commerce laws.

Eberle v. *Michigan*, 232 U. S. 700, 58 L. ed. 803.
Purity Extract etc. Co. v. *Lynch*, 226 U. S. 192, 57 L. ed. 184.
United States v. *Lanza*, 67 L. ed. 314.

II. Federal legislation in aid of state prohibition laws prior to the 18th Amendment had removed all impediments to the enforcement of prohibition of the liquor traffic theretofore existing in the interstate commerce laws.

Adams Express Co. v. *Kentucky*, 238 U. S. 190.
Clark Distilling Co. v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326.
Seaboard Air Line v. *North Carolina*, 245 U. S. 298, 62 L. ed. 299.

United States Code annotated,
27 Sec. 121,
27 Sec. 122,
27 Sec. 123,

West Virginia v. *Adams Express Co.*, 219 Fed. 794.

III. The laws of the Federal Government enacted prior to the National Prohibition Act in aid of the state prohibition laws were not repealed by the Eighteenth Amendment and the Volstead Law, but are still in full force and effect.

Pollard v. *Com.*, (Va.) 110 S. E. 354.
Ramey v. *Grace & Co.*, 231 U. S. 703, 58 L. ed. 445.
State v. *Enoch*, 26 W. Va. 253.
State v. *Stoll*, 17 Wall. 425.
United States Code Annotated, 27 Sec. 3.
United States Code Annotated, 27 Sec. 52.
Vinson v. *County Court*, 94 W. Va. 591.
Washington v. Miller, 225 U. S. 422, 59 L. ed. 295.

IV. The Eighteenth Amendment and the National Prohibition Act prohibiting the sale and transportation of liquors except as provided for certain purposes, and giving the states concurrent power to enforce prohibition by appropriate legislation does not invalidate the prohibition laws of West Virginia, though the laws employ different definitions, regulations and penalties in aid of the Amendment.

Allen v. *Com.*, 129 Va. 723.
Christian v. *Com.*, 132 Va. 616.
Com. v. *Nickerson*, (Mass.) 128 N. E. 273.
Hazel Drug Co. v. *Wilmer* (Pa.) 131 Atl. 286.
Lowry v. *Com.*, 132 Va. 574.
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Miller v. *Com.*, 135 Va. 597.
Pollard v. *Com.*, 132 Va. 576.
Ramsey v. *State*, 250 S. W. 674.
State v *Certain Intoxicating Liquors*, 192 Iowa 629, 185 N. W. 145.
State v. *Henson*, 91 W. Va. 701.
State v. *Knosky*, 87 W. Va. 558.
State v. *Moore*, 95 W. Va. 604.

State v. *National Selright Association,* 192 Iowa 629.
United States Code Annotated, 27 Sec. 13.
Vigliotto v. *Pennsylvania,* 66 L. ed. 686.
Woods v. *Seattle,* 270 Fed. 315.

V. The laws of West Virginia, and not the National Prohibition Act are determinative of the question whether appellants as non-resident wholesale dealers in products containing ethyl alcohol may without a permit from the state Commissioner of Prohibition authorizing them so to do, transport and sell to resident dealers, their said products defined as liquors by the state law.

Adams Express Co. v. *Kentucky,* 238 U. S. 190, 59 L. ed. 1267.
Constitution of West Virginia, Art. 6, sec. 40.
Dauffer-Liederman Brewing Co. v. *United States,* 36 Fed. (2d) 568.
Hamilton v. *Rathbone,* 175 U. S. 414, 44 L. ed. 219.
Intoxicating Liquor Cases, 25 Kans. 751.
Mitchel v. *Com.,* 106 Ky. 602, 51 S. W. 17.
Shatiro v. *Lyle, Prohibition Commissioner,* 30 Fed. (2d) 971.
State v. *Durr,* 69 W. Va. 251.
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Ch. 60, Art. 1, Sec. 5.

Ch. 60, Art. 1, Sec. 9.
Ch. 60, Art. 1, Sec. 11.
Ch. 60, Art. 1, Sec. 13.
Ch. 60, Art. 1, Sec. 3.
West Va. Statutes, Acts 1877, ch. 107; Acts 1913, ch. 13.

ARGUMENT.

The claim of Appellants that they have the right to transport and sell certain alcoholic products in the State of West Virginia without obtaining a permit so to do from the State Commissioner of Prohibition as required by the laws of said State seems to be predicated on the theory that Federal legislation is all controlling—that the definition of "liquors" in the Volstead Act and not that of the West Virginia statute is to be applied in this case; and that a federal permit to manufacture their alcoholic products gives them the character of legitimate articles of interstate commerce, with the consequent right to transport and sell said products in the State, notwithstanding they may be intoxicating in fact, and are denounced by the laws of said State as "liquors."

In reply to this proposition it is contended that the State under its inherent police power could regulate or prohibit the liquor traffic subject to the limitations of the interstate commerce laws; that federal legislation prior to the 18th Amendment in aid of state prohibition laws removed all impediment to the enforcement of the state laws theretofore existing in the interstate commerce laws; that the 18th Amendment and the National Prohibition Act did not repeal these laws; that the State has the power to prohibit the manufacture and traffic in intoxicating liquor by any laws and regulations it may enact, not directly in conflict with the national prohibition laws, and that the prohibition laws of West Virginia requiring the permits in question in this case is appro-

priate legislation for the enforcement of the amendment and not inconsistent with any federal legislation.

I. Under its police power the State has always had the authority to regulate or prohibit the traffic in liquors, subject to the limitations of interstate commerce laws.

Under their inherent police power, the several states had, prior to the Eighteenth Amendment, the right to regulate, restrain or prohibit the manufacture and sale of intoxicants, and, in the exercise of this power, subject to the limitations and restrictions imposed by the commerce clause of the Constitution of the United States, had power to enact any and all laws for the suppression of intemperance and the minimizing of the evils resulting from the traffic in or use of intoxicating liquors by totally prohibiting or by restricting and licensing the manufacture and sale thereof, and to make such provisions to enforce and prevent the evasion of such laws as seemed expedient to the several legislatures.

Eberle v. *Michigan*, 232 U. S. 700, 58 L. ed. 803;
Purity Extract etc. Co. v. *Lynch*, 226 U. S. 192, 57 L. ed. 184.

In the case of *United States* v. *Lanza*, 67 L. ed. 314, the court, discussing this power of the states said:

> "To regard the amendment as the source of the power of the states to adopt and enforce prohibition measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the federal constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible

inference that, investing the national government with the power of country-wide prohibition, state power would be excluded. In effect the second section of the Eighteenth Amendment put an end to restrictions upon the state's power arising out of the federal constitution, and left her free to enact prohibitions within her limits. To be sure, the first section of the amendment took from the states all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. Such laws derive their force, as do all new ones consistent with it, not from this amendment, but from power originally belonging to the states, preserve to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal constitution."

II. Federal legislation in aid of state prohibition laws prior to the 18th Amendment had removed all impediments to the enforcement of prohibition of the liquor traffic theretofore existing in the interstate commerce laws.

(a) The federal laws placing intoxicating liquors within the jurisdiction of the states and subject to their laws and divesting such liquors of any protection of the interstate commerce laws are the following:

The Wilson Original Package Law.

"All fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and the same manner as though such

liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

27 USCA, section 121.

The Webb-Kenyon Law.

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or district of the United States or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or district of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

27 USCA, section 122.

The Reed Amendment.

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacremental, medicinal, and mechanical purposes, into any state or territory the laws of which state or territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be

punished as aforesaid: *Provided*, that nothing herein shall authorize the shipment of liquor into any state contrary to the laws of such state."
27 USCA, section 123.

(b) The laws referred to above in no way affect the enforcement of Federal prohibition laws. They simply deny protection to the violators of state statutes and leave the states at liberty to enforce their own laws in their own way, unrestricted and unhampered by interstate commerce laws and regulations. This is evidenced by the fact that neither the Wilson or Webb-Kenyon law carries with it any penalty for its violation. The matter of enforcement and the provisions for penalties for violations are left exclusively with the several states.

The decision are numerous which hold that by reason of the Webb-Kenyon Act shipments that are intended by any person interested to be received, possessed, sold, or in any manner used in violation of the state law are separated from other shipments, and the protection theretofore given by the interstate commerce clause of the Federal Constitution to such shipments removed. Since, however, the Supreme Court of the United States has passed upon the effect of this act, and that, too, in a case involving the West Virginia law, we do not deem it necessary to cite extensively decisions from other jurisdiction. In the case of *James Clark Distilling Company* v. *Western Maryland R. Company*, 61 Law ed. 326, it was held:

> "Any immunity from the prohibitions of W. Va. Code 1913, Chapter 32A, as amended by laws 1915, chapter 7, section 7, laws 1915, 2d Ex. Sess., chapter 7, section 34, against the shipment from without the state of intoxicating liquors intended for personal use, and the receipt and possession of liquors so transported, which the interstate character of such a shipment might otherwise

> give, was taken away by the provisions of the Webb-Kenyon Act of March 1, 1913 (37 Stat., at L. 699, chap. 90 Comp. Stat. 1913, sec. 8739), forbidding the interstate shipment or transportation of intoxicating liquor which is intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the law of the state to which the liquor is transported, although individual use may not have been prohibited by the West Virginia law."

Construing the Webb-Kenyon Act, the United States Circuit Court of Appeals, Fourth Circuit, in the case of *West Virginia* v. *Adams Express Company*, 219 Fed. 794, held as follows:

> "A state may, in view of the Webb-Kenyon Act prohibiting the transportation of intoxicating liquor from one state to another which is intended to be received, possessed, sold, or used in violation of any law of the latter state, prohibit the sale of intoxicating liquors within its limits, and provide that sales in which the delivery is to be made by a carrier shall be deemed to be in the county where they are to be delivered, so as to be entitled to enjoin the carrier from making deliveries in violation of its statute although the liquors are shipped from another state."

In arriving at this conclusion, the court through Woods, Circuit Judge, took occasion to say:

> "The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of interstate commerce that even under the Wilson bill liquor dealers in one state were protected in impairing or defeating the efforts of another

> state to root out or to minimize the evil of the use of liquor as a beverage. This statute prohibits the shipment from one state into another not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in any manner used in violation of the state law. This is a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce. The State of West Virginia has enacted with reference to a contract for the sale of liquor, that 'the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee,' and it expressly forbids a sale within the state. This makes the receipt or delivery have the effect of a sale, and in forbidding the sale it forbids the receipt or delivery, which under the statute is the consummation of the sale. Thus it appears that the transportation and deliveries contemplated for the future fall within the express description of the transactions from which the Congress intended to withdraw the protection of interstate commerce. Any other construction would not only distort the language, but continue the obstacles to the enforcement of state prohibition laws which it was the manifest intention of the Congress to remove."

The identical provision of the West Virginia law which the court was passing on in this case, is still a part of the prohibition laws of this state, and contained in section 4 of article 1 of said chapter 60 of the Code, the same statute in which it was contained at the time of the decision aforesaid. It makes the place of the sale of liquors when delivery is made by a common or other carrier, in the county wherein the delivery thereof is

made by such carrier. In addition, as is hereinafter pointed out, V.-d), the same provision as to the place of sale is contained in section 11 of said article 1, wherein it is made unlawful for any nonresident vendor, dealer, or other person, to sell liquors in this state in violation of the laws thereof. The decision last above referred to gives force and effect to these provisions of the law of this state, under the Webb-Kenyon Act.

> "The power of a state under the Webb-Kenyon law to forbid shipment into its territory of intoxicating liquors from other states includes the lesser power to prescribe by law the conditions under which such shipments may be allowed." *Seaboard Air Line Ry.* v. *North Carolina,* 245 U. S. 298, 62 U. S. L. ed. 299.

Justice McReynolds in his opinion in this case says:

> "For some years it has been the established policy of North Carolina, approved by popular vote and expressed and enforced by the general any many local statutes, that, except in very restricted instances, the manufacturing and sale of intoxicating liquors shall not be allowed. *Smith* v. *Southern Exp. Co.* (1914), 166 N. C. 155, 157, 82 S. E. 15.
>
> "Since our decision in *Clark Distilling Co.* v. *Western Maryland R. Co.,* 242 U. S. 311, 320, 324, * * *, it has not been open to serious question that the Webb-Kenyon Law is a valid enactment; that its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford means by subterfuge and indirection to set such laws at naught; and that under it a state may inhibit shipments therein of

intoxicating liquors from another by a common carrier although intended for the consignee's personal use, where such use is not actually forbidden. Plainly, therefore, after that enactment nothing in the laws or constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake County a penal offense irrespective of any personal right in a consignee there to have and consume liquor of that character.

"The challenged act, instead of interposing an absolute bar against all such shipments, as it was within the power of the state to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less.

"The provisions of section 15, Act to Regulate Commerce, here relied on, were intended to apply to matters within the exclusive control of the Federal Government; and when by a subsequent act Congress rendered interstate shipments of intoxicating liquors subject to state legislation, those provisions necessarily ceased to be paramount in respect to them."

In *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 61 L. ed. 326, the court criticized and refused to follow the holding of the court in *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, relied on by counsel (Appellants' brief p. 16) to establish the proposition that before that statute making the place of delivery the place of sale can be held applicable, there must be an *intent* to violate the laws of the State of West Virginia, saying:

"The case in this court relied upon to establish the contrary (*Adams Ex. Co.* v. *Kentucky*, 238 U. S. 190, 59 L. ed. 1267. L. R. A. 1916C, 273, 36

Sup. Ct. Rep. 824, Ann. Cas. 1915D, 1167) clearly does not do so. All that was decided in that case was that, as the court of last resort of Kentucky, into which liquor had been shipped, had held that the state statute did not forbid shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. The leading state case cited is *Van Winkle* v. *State*, 4 Boyce (Del.) 578, 91 Atl. 385, Ann. Cas. 1916D, 104. It is true in that case the state law prohibited shipment to and receipt of intoxicants in local-option territory, and if the Webb-Kenyon Law had been applied, there would have been no possible ground for claiming that the state prohibitions could be escaped because the liquor was shipped in interstate commerce. But the shipment was held to be protected as interstate commerce despite the state prohibitions because the Webb-Kenyon Law was not correctly applied, for the following reason: Coming to consider the test of that law, the court said that as the Webb-Kenyon Act prohibited the shipment of intoxicants 'only when liquor is intended to be used in violation of the law of the state,' and as the liquor shipped was intended for personal use, which was not forbidden, therefore the shipment, although prohibited by the state law, was beyond the reach of the Webb-Kenyon Act. But we see no ground for following the ruling thus made, since, as we have already pointed out, it necessarily rested upon an entire misconception of the text of the Webb-Kenyon Act, because that act did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

III. The laws of the Federal Government enacted prior to the National Prohibition Act in aid of the state prohibition laws were not repealed by the Eighteenth Amendment and the Volstead law, but are still in full force and effect.

The National Prohibition Act does not by express terms attempt to repeal either the Wilson Act, the Webb-Kenyon Act or the Reed Amendment, hence no express repeal is effected. Nor do these three enactments, or any of them, contain any provisions in conflict with, or so contrary to the provisions of the National Prohibition Act that it may be said that they are repealed by implication.

The repeal of statutes by implication is not favored by the courts, and the presumption is always against the intention to repeal where express terms are not used.

Ramey v. *W. R. Grace & Co.*, 231 U. S. 703, 58 L. ed. 445;
Vision v. *County Court*, 94 W. Va. 591.

The rule of law is well settled that to repeal a statute by implication there must be such a positive, plain and visible repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled.

State v. *Stoll*, 17 Wall. 425;
Washington v. *Miller*, 225 U. S. 422, 59 L. ed. 295;
State v. *Enoch*, 26 W. Va. 253.

Indeed, the repeal provisions of the National Prohibition Act itself make it plain that these earlier acts were not repealed but were to remain in force and effect. Such provisions, in part, read:

> "All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."
>
> 27 USCA, Section 52.

> "All laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violation of such laws that were in force on October 28, 1919, shall be and continue in force, as to both beverage and nonbeverage liquor, except such provisions of such laws as are directly in conflict with any provisions of this title; * * * "
>
> 27 USCA, Section 3.

Neither the Eighteenth Amendment nor the Volstead Acts deals specifically with the subject matter of the Webb-Kenyon Act or the Reed Amendment, and it would be straining the rule of repeal by implication indeed, to say that there are any provisions in the Volstead or National Prohibition Act calling for its invocation.

The Supreme Court of Appeals of Virginia, in the case of *Pollard* v. *Commonwealth*, 110 S. E. 354, held that the provisions of the Webb-Kenyon Act were left in force by the Volstead Act, and may be taken advantage of by the state saying:

> "Under the Webb-Kenyon Act, the state had ample power to prevent the importation of intoxicating liquor from without its borders * * *. The provision of that act is still in force, and consequently may still be taken advantage of by the state. Section 39 of the prohibition act of this state is not in conflict with the Eighteenth Amendment or the Volstead Act, and is still in force."

If the Wilson law be repealed, the old original package outrage will have been restored. Then alcoholic articles, manufactured under government permits, will be under interstate commerce protection and sold openly, in defiance of any state law. Liquor, manufactured under a government permit, and the sale of which is not prohibited by state law, may be sold in bottles as original packages, and the state be helpless.

If the Webb-Kenyon law be repealed, then many concoctions, the sale of which are prohibited by certain states, will no longer be subject to the laws of the state the moment they cross the state line, as now, but only after they have passed into the hands of the consignee, and packages apparently containing liquors may not be opened or inspected by state officers so long as they are in the hands of an interstate transportation agency.

If the Reed "bone dry" law be repealed, the United States mail and other means of interstate communication and transportation will again be available for the purchase and transportation of certain alcoholic liquors or liquids, manufactured under federal permits and sold without any permit restrictions, as legitimate articles of commerce, regardless of their prohibition under the laws of the state into which they are to be imported.

IV. The Eighteenth Amendment and the National Prohibition Act prohibiting the sale and transportation of liquors except as provided for certain purposes, and giving the states concurrent power to enforce prohibition by appropriate legislation does not invalidate the prohibition laws of West Virginia, though these laws employ different definitions, regulations and penalties in aid of the Amendment.

State Laws Not Affected by National Prohibition Act.

The courts are unanimous in their decisions that the state do not derive their power to legislate concerning

prohibition from the Eighteenth Amendment, but from the residuum of the police power left them by the Federal Constitution, and that they have all the power they possessed before the adoption of the Eighteenth Amendment or the enactment of the National Prohibition Act, with the sole limitation that state laws cannot legalize that which the Federal prohibition laws prohibit. In any field not expressly covered by the Federal law the states may use their common law police power unhampered. Further, it is the unanimous opinion of the courts that existing state legislation was not suspended or superseded by the Eighteenth Amendment or the Volstead Act.

In *Woods* v. *Seattle,* 270 Fed. 315, the court held that the National Prohibition Act did not prevent the state from granting to a city police power to legislate in limitation of the sale of intoxicating liquors, and the fact that Jamaica ginger is not prohibited by the national act does not prevent the city from prohibiting such sale.

The Washington bone-dry law of 1917 absolutely prohibited the sale of Jamaica ginger and a druggist brought suit to enjoin the enforcement of this act on the ground that it transcended the powers of the state. The court, however, held that the Eighteenth Amendment and the Volstead Act were not grants of rights by the state to the National Government, but were limitations on a privilege which did not override all police power of the state. That the police power of the state is paramount where it does not authorize what the National act prohibits, and through its inherent reserve power it still has the right to prohibit but may not authorize what is forbdden by the Eghteenth Amendment or the Volstead Act.

In discussing the Eighteenth Amendment, the Supreme Court of Massachusetts in the case of *Commonwealth* v. *Nickerson,* 128 N. E. 273 held:

"The amendment does not require that the exercise of the power by congress and by the states shall be coterminous, coextensive and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the same general purposes, provided they are not in immediate and hostile collision one with the other. In instances of such collision the state legislature must yield.

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making contribution to the same general aim according to the needs of the state even though congress also has exerted the power reposed in it by amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identified with that of congress. It cannot authorize that which is forbidden by congress. But the states need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead Act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the act of congress. The concurrent power of the states may differ in means adopted provided it is directed by the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute prohibition declared by the Eighteenth Amendment is not void or inoperative simply because congress in performance of the duty cast upon it by the amendment has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adopted to putting into execution the inexorable mandate

against the sale of intoxicating liquors for beverage contained in section 1 of the amendment, by different definitions, regulations and penalties from those contained in the Volstead Act but in harmony therewith are valid. Existing laws of that character are not suspended or superseded by the act of congress. The fact that congress has enacted legislation governing in general the field of national prohibition does not exclude the operation of appropriate state legislation within the territory of the state. The power thus reserved to the states must be put forth in aid of the enforcement and not for the obstruction of the dominant purpose of the amendment. It must not be in direct conflict with the act of congress in the same field. Subject to these limitations growing out of the nature of our dual system of government, the power of the states is constant, vital, effective and susceptible of continuous exercise. We think that these results follow from the words of the amendment, from the implication of conclusions and of the opinion in *Rhode Island* v. *Palmer,* and from other decisions to which reference has been made."

In *Vigiotti* v. *Pennsylvania,* 66 L. ed. 686, the Supreme Court of the United States passing upon a Pennsylvania law which prohibited every sale of spirituous liquors without a state license, held:

"The Brooks Law as thus construed, does not purport to authorize or sanction anything which the Eighteenth Amendment or the Volstead Act prohibits. And there is nothing in it which conflicts with any provision of either. It is merely an additional instrument which the state supplies in the effort to make prohibition effective. That the state may by appropriate legislation, exercise

its police power to that end, was expressly provided in section 2 of the amendment, which declares that congress and the several states shall have concurrent power to enforce this article by appropriate legislation. National prohibition cases (*Rhode Island* v. *Palmer*) 253 U. S. 350, 387 64 L. ed. 946, 978, 40 Sup. Ct. Rep. 486, 588. That the Brooks Law, as construed is appropriate legislation, is likewise clear. To prohibit every sale of spirituous liquors except by licensed persons may certainly aid in preventing sales for beverage purposes of liquor containing as much as one-half of one per cent of alcohol; and that is what the Volstead Act (409) prohibits. If the Brooks Law as construed, had been enacted the day after the adoption of the amendment it would obviously have been 'appropriate legislation.' It is not less so because it was already in existence."

Other decisions in point, including those of the Supreme Court of Appeals of West Virginia and Virginia, are the following:

"The adoption of the Eighteenth Amendment to the Constitution of the United States does not deprive a state of the right to exercise its police power in the enforcement of its own public policy, so long as its legislation does not conflict with any of the provisions of the federal amendment and the laws enacted in pursuance thereof."

State v. *Moore*, 95 W. Va. 604.
State v. *Henson*, 91 W. Va. 701.

"The Eighteenth Amendment to the Constitution of the United States and the act of Congress known as the Volstead Act did not annul and supersede the prohibition law of the state."

Miller v. *Com.*, 135 Va. 597.
Pollard v. *Com.*, 132 Va. 576.
Lowry v. *Com.*, 132 Va. 574.
Allen v. *Com.*, 129 Va. 723.

"It is clearly within the police power of the state to prohibit the sale of other beverages which produce intoxication and thus affect the public health, peace and morals as it is to prohibit the sale of alcoholic beverages which also produce disastrous results when used to excess."

Christian v. *Com.*, 132 Va. 616.

"The general prohibition law enacted by Congress does not provide an exclusive remedy for the enforcement of the provisions of the eighteenth Amendment to the Constitution of the United States. By the very terms of that amendment, not only Congress but the several states are given power to enforce its provisions against the sale or manufacture of intoxicating liquor, and any state legislation in aid of that general purpose will be enforced, notwithstanding offenses may be created and punishments provided in addition to those offenses created and punishments prescribed by the general prohibition law enacted by Congress." *State* v. *Knosky*, 87 W. Va. 558.

Numerous other cases might be cited, but we think enough has been shown to establish beyond question that the states do not derive their power to legislate concerning prohibition from the Eighteenth Amendment, but from their own police power, and that the only inhibition against such legislation is that the state law cannot legalize that which the Federal prohibition law prohibits. The laws which the appellees in this proceeding seek to uphold, are in no wise in conflict with the Federal

prohibition laws, and do not attempt to legalize anything which the Eighteenth Amendment or the National Prohibition Act prohibits. They are valid laws and should be given full force and effect.

Enforcement of State Laws Not Affected by Federal Definition of Intoxicating Liquor or Federal Permits.

27 USCA, section 13, cited on p. 20 of appellant's brief, enumerates certain preparations produced or manufactured under federal permit which attempts to prevent their use as intoxicants, by providing that they shall be "unfit for use for beverage purposes" or "for intoxicating beverage purposes", and then in admission of the fact that these articles may be used as intoxicating beverages provides the same penalty for their sale for beverage purposes as the penalty imposed in the case of the sale of "liquors" in the scope of the federal definition.

Can appellants consistently maintain that West Virginia under her police power and concurrent jurisdiction in the enforcement of prohibition cannot regulate or prohibit the transportation and sale of such of these articles coming within the state's definition of liquors?

> "The fact that a company making a medicinal preparation has a permit from the Commissioner of Internal Revenue under this section (sec. 13) does not prevent the state from determining that such preparation is intoxicating, and capable of use as a beverage, and ordering it destroyed, since a state can legislate more rigorously than Congress under the Eighteenth Amendment without there being a conflict between federal and state legislation, there being no conflict as long as the state and federal acts can consistently stand together."

State v. *Certain Intoxicating Liquors*, 185 N. W. 145, 192 Iowa 629.

"A permit granted under this section does not preclude an inquiry in a prosecution under a state law into the question whether the preparation is in fact used as an intoxicating beverage."

State v. *National Selright Association Id.* 192 Iowa 629.

"Seller of flavoring extracts containing fifty per cent of alcohol under circumstances from which he could reasonably infer purchaser's intent to use it as beverage was guilty of selling intoxicating liquor for beverage purposes in violation of this section." (sec. 13.)

Massei v. *U. S.* 295 Fed. 683. Certiorari denied U. S. 592, 68 L. ed. 865.

"A United States Government permit, however, does not authorize the sale of alcohol liquors in violation of the laws of this state. Constitution U. S. Amendment Eighteen, sections 1, 2, confers concurrent power on the United States Government and several states to enforce the Eighteenth Amendment by appropriate legislation, and either state or federal government may enact laws for that purpose."

Hazel Drug Co. v. *Wilmer*, (Pa.) 131 Atl. 286.

"Although the constitution forbids the manufacture, sale, etc., of intoxicating liquor except for certain purposes, the legislature has power to impose a restrictive legislation upon the manufacture, sale, etc., of such liquors for the excepted purposes by requiring the persons who so attempt to manufacture and sell to procure a permit."

Ramey v. *State*, (Tex.) 250 S. W. 674.

V. The laws of West Virginia, and not the National Prohibition Act, are determinative of the question whether appellants as non-resident wholesale dealers in products containing ethyl alcohol may without a permit from the State Commissioner of Prohibition authorizing them so to do, transport and sell to resident dealers their said products defined as liquors by the State law.

(a) *The West Virginia laws directly applicable are as follows:*

Constitution, Article 6, Section 46:

> "On and after the first day of July, One Thousand Nine Hundred and Fourteen, the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drinks, mixture or preparation of like nature, except as hereinafter provided, are hereby prohibited in this state; provided, however, that the manufacture and sale and keeping for sale of such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes, and the manufacture and sale of denatured alcohol for industrial purposes *may be permitted under such regulations as the legislature may prescribe.* The legislature shall, without delay, enact such laws, *with regulations, conditions, securities and penalties* as may be necessary to carry into effect the provisions of this section." (Italics ours.)

Section 1 of Article 1 of Chapter 60, Official Code of West Virginia:

> "The word 'liquors,' as used in this chapter, shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any

other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this statute; *and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication,* and all beverages containing one-half of one per cent or more of alcohol by volume, shall be deemed spirituous liquors, and shall be embraced in the word 'liquors,' as used in this statute." (Italics ours.)

Section 4 of Article 1 of Chapter 60, Official Code:

"Except as hereinafter provided, if any person acting for himself, or by, or through another, shall sell, keep, store, offer, or expose for sale, or solicit or receive orders for any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor * * *. And in case of sale in which a shipment or delivery of such liquor is made by a common or other carrier the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

Section 5 of Article 1 of Chapter 60, Official Code:

"The provisions of this chapter shall not be construed to prevent * * * the sale and keeping and storing for sale by druggists of wine for sacramental purposes by religious bodies, or any United States Pharmacopoeia or national formulary preparation in conformity with the West Virginia Prarmacy Law, or any preparation which is exempted by the provisions of the national pure food law; * * * provided, that no one shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in sec-

tion 1 of this article and as herein excepted, without first obtaining a permit from the Commissioner of Prohibition so to do. * * *

"(a) All manufacturers of liquors and wholesale dealers therein shall pay a fee of $50.00 for each permit; (b) All purchasers in wholesale quantities of ethyl alcohol in any form, whether pure, medicated, or denatured, for use as herein provided, shall pay a fee of $10.00 for each permit; (c) All purchasers in wholesale quantities of liquors as defined in section 1 of this article for sale at retail, except duly licensed druggists, shall pay a fee of $2.00 for each permit. * * *

"Permits shall be issued for the calendar year and shall expire on the 31st day of December following the issuance thereof. * * * Provided, further, that such liquors shall be manufactured, sold, kept for sale, transported and used under permits issued by the Federal Prohibition Commissioner and in accordance with the regulations issued in pursuance of the national prohibition act."

Section 9 of Article 1 of Chapter 60, Official Code:

"Common carriers are forbidden to carry liquors into the state or from one place to another within the state, "except a common carrier may, for hire, carry pure grain alcohol and wine and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five of this article."

Section 11 of Article 1 of Chapter 60, Official Code:

"It shall be unlawful for any non-resident vendor, dealer or other person to sell or furnish any malt, brewed, vinous or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not, and wheth-

er intoxicating or not, to any person, corporation or firm within the territory of this state, when such liquors, mixtures, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition law of this state; and in case of such sale or furnishing in which a shipment or delivery of such liquor is made by a common or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

Section 13 of Article 1 of Chapter 60, Official Code:

"It is unlawful for any person in this state to receive or possess liquors received directly or indirectly from a common or other carrier. "Provided, however, that druggists may receive and possess pure grain alcohol, wine and such preparations as may be sold by druggists for the special purpose and in the manner as set forth in section five of this article and section three, article two of this chapter."

Section 3 of Article 2 of Chapter 60, Official Code:

"The manufacture of alcohol, wine, and other liquors, and the sale of the same by the manufacturers, by wholesale druggists and other dealers shall be under the supervision of the Commissioner and under such rules and regulations as he may from time to time prescribe."

(b) *Meaning of, and effect to be given Prohibition Laws of West Virginia.*

Referring first to Section 4 of Article 1 of Chapter 60 of the Code, as above quoted, it will be observed that

this Section makes it unlawful, "except as hereinatfer provided," to sell, keep, store, offer, or expose for sale, or receive orders for any liquors, and that in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier, the sale thereof shall be deemed to be in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee. The exception provided for in this statute, applicable to this case, is found in Section 5 of said Article 1 of Chapter 60, which, after withdrawing from the provisions of said Chapter 60 the sale and keeping and storing for sale of any United States Pharmacopoeia or national formulary preparation in conformity with the West Virginia Pharmacy Law, or any preparation which is exempted by the provisions of the national pure food law contains the proviso that no one shall manufacture, sell, keep for sale, purchase or transport any liquors, *as defined in Section 1 of this article, and as herein excepted*, without obtaining a permit from the Commissioner of Prohibition so to do, and fixes the amount to be paid for such permit.

To ascertain what is meant by the word "liquors," as used in both of said Sections 4 and 5, we turn to Section 1 or Article 1 of said Chapter 60, wherein, among other things, it is provided that "all liquids, mixtures or preparations, whether patented or not, which will produce intoxication," shall be deemed spirituous liquors, and shall be embraced in the word "liquors" as used in this chapter. So, reading Sections 1, 4 and 5 together, it is clear that the sale of liquids, mixtures or preparations, whether patented or not, which will produce intoxication, without first obtaining a permit from the Commissioner of Prohibition so to do, is unlawful, and that where shipment or delivery of such liquids, mixtures or prepara-

tions is made by a common or other carrier, the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier.

This definition of liquors as set out in said Section 1 was written upon the statute books of this state as a part of the law forbidding the sale of intoxicating liquors without a license therefor, long prior to the adoption of the constitutional amendment forbidding the sale of intoxicating liquors, and its enactment into law as a part of Chapter 13 of the Acts of 1913 pursuant to said constitutional amendment. By Chapter 107 of the Acts of 1877 it was provided that "no person without a license therefor shall * * * sell, offer or expose for sale, spirituous liquors, wine, porter, ale or beer, of any drink of like nature. And all mixtures or preparations known as "bitters" or otherwise, which will produce intoxication, whether they be patented or not, shall be deemed spirituous liquors within the meaning of this Section." By Chapter 29 of the Acts of 1885, the word "liquid" was added after the word "preparation," and from that time up to the enactment of the present statute in 1913, "liquors" was defined as follows: "And all mixtures, preparations or liquids, known as 'bitters' or otherwise, which will produce intoxication, whether they be patented or not, shall be deemed spirituous liquors within the meaning of this section."

(c) *Decisions of State Court Based upon Statutory Definition of Liquors.*

In *State* v. *Muncey*, 28 W. Va. 494, conviction for sale of essence of cinnamon without a state license for the sale of intoxicating liquors was sustained. In its opinion, the court, after quoting definitions of "essence" and "Cinnamon" as given by Webster, said:

> "Take whichever of these definitions we may of the words 'essence' and connect it with the word 'cinnamon' and the necessary conclusion is that the 'essence' and the necessary conclusion is that the 'essence of cinnamon' is a 'preparation or mixture.' It is immaterial what are the ingredients of the preparation or mixture, or by what name it is known, or whether it is patented or not, if it will produce intoxication the sale of it is prohibited by the statute. The 'essence of cinnamon' then, being a preparation or mixture, the only question for this court to decide in this case is, whether or not the evidence was sufficient to warrant the jury in finding that it would produce intoxication, or rather whether the jury, upon any reasonable view of, or deductions from the evidence certified, was justified in finding that the particular 'essence of cinnamon' sold by the defendant in this case did produce intoxication. If we can not judically know that the 'essence of cinnamon' may produce intoxication, we certainly can not judicially know that it may not do so. The question, therefore, is one of fact purely."

In *State* v. *Durr*, 69 W. Va. 251, it was held that as to drinks not mentioned in the statute, the intoxicating quality was the test, the court saying:

> "* * * in 1885, the section was amended by inserting the word 'liquids' in addition to 'mixtures' and 'preparations,' and now cider would be a liquid, and, if strong enough to produce intoxication, would be, in law, deemed spirituous liquor, and evidence to prove and disprove its intoxicating properties would be admissible."

In *State* v. *Good*, 56 W. Va. 215, defendant was indicted for making sale of an intoxicating liquid called "rikk"

and it was urged on his behalf that the article sold was not in fact one of prohibited liquors mentioned in the indictment, namely spirituous liquors, wine, porter, ale, beer and drinks of like nature. The court, as shown by point 1 of the syllabus, held:

> "Proof of an unlawful sale of a mixture, preparation or liquid 'which will produce intoxication' will sustain a conviction upon an indictment charging the unlawful sale of 'spirituous liquors, wine, porter, ale, beer, and drinks of like nature' without a state license therefor. For the purposes of chapter 32 of the code of 1899 such mixture, preparation or liquid is, in law, spirituous liquor, whether it be such, in fact or not."

In *State* v. *Henry*, 74 W. Va. 72, under an indictment charging the sale, without a license therefor, of "spirituous liquors, wines, porter, ale, beer, and drinks of a like nature," and the statutory provision (Code 1906, chap. 32, sec. 1) providing that "all mixtures, preparations, or liquids which will produce *intoxication*, whether they are patented or not," should "be deemed spirituous liquors within the meaning of this section," it was held that the only question which could be fairly presented to the jury was whether the liquor sold would produce intoxication, in the ordinary and common acceptation of the word, when drunk in sufficient quantities. This question, it was held, was fully and fairly presented to the jury by the following instruction: "The court instructs the jury that, in order to make any fluid or liquid an intoxicating drink, it must be capable of producing intoxication, in the usual sense and common acceptation of the term intoxication; that is, it must have in it a sufficient amount of alcohol to produce intoxication when consumed in sufficient quantities."

In each of these cases the question involved was whether a conviction for the sale of a liquid or preparation not specifically named in the statute forbidding the sale of intoxicating liquors without a state license therefor, should be upheld or set aside, and the guiding principle in the determination of this question was whether the liquid was capable of producing intoxication. This was the polestar from which the court never deviated, and when it was found that the liquid so sold without a license was in fact intoxicating, the court unhesitatingly affirmed the conviction.

(d) *State Laws Prohibit Sale of Liquors Transported into the State from another except under permit from State Commissioner of Prohibition.*

It is self evident, and requires no argument to show that the construction to the definition of liquors under a law which prohibited their sale without a license should be given to the definition when written into a law which prohibits the sale of the liquors without a permit. If under the license law, mixtures, preparations or liquids, known as "bitters" or otherwise, which will produce intoxication, could not be sold without a license, it would follow that "all mixtures, preparations or liquids which will produce intoxication" may not be sold under the existing law without a permit from the Commissioner."

Likewise, if, as we have already shown, a permit is required for the sale thereof, Section 11 of Article 1 of said Chapter 60 is complete within itself in making it unlawful for non-resident vendors or dealers to sell liquors in this state without such permit. This section makes it unlawful for any non-resident vendor, dealer or other person to sell or furnish liquors to any person in the state, when the same is to be received, possessed, *sold*, or in any manner used in violation of the prohibi-

tion laws of this state, and when delivery is to be made by a common or other carrier, makes the place of delivery the place of sale. When, therefore, the appellants as non-resident dealers or vendors sell their products in this state and deliver same by a common or other cerrier, this statute fixes the place of sale at the place of delivery. The products are not sold until they arrive in the state at the place of delivery, when they are then sold by hte appellants to the purchaser; which sale constitutes one within the state, for which a permit is required, and if the sale be made without such permit, it is made in violation of the prohibition laws of this state, and becomes an unlawful sale, to which a penalty is attached by this section. In other words, the products when shipped into West Virginia are still the property of the non-resident vendors when they reach the place of delivery and until a sale is made by said vendors. If, when such sale is made, the vendors do not have a permit for their sale as required by said Section 5 of Article 1, they are an interested party making a sale in the State of West Virginia in violation of the law, a transaction which the statute forbids. It will not do to say that when non-resident vendors take orders for, and transport into this state liquors, that they are not "interested" in said liquors, within the meaning of that term as used in our statute prohibiting liquors so transported to be sold by any person interested therein, up to the time of its delivery to the consignee. Until such delivery such liquors have not yet been sold in the State of West Virginia. Any loss thereof in transit would be borne by the vendor or dealer so making the shipment. It is his liquor until the time it is delivered to the consignee, at which time he becomes the seller in the State of West Virginia, and the consignee becomes the purchaser.

By the constitutional provision prohibiting the sale of liquor in this state, it is provided that the manufacture

and sale and keeping for sale of certain liquors may be permitted under such regulations as the legislature may prescribe, and that the legislature shall enact such laws, with regulations, conditions, securities, and penalties as may be necessary to carry into effect the provisions of the constitution. Pursuant to this authority the legislature, by Section 3 of Article 2 of Chapter 60 of the Code, has clothed the Commissioner of Prohibition with supervision over the manufacture of alcohol, wine, and other liquor, and the sale of same by the manufacturer, wholesale druggist and other dealers, and placed the same under such rules and regulations as he may from time to time prescribe. Under this authority the Commissioner of Prohibition has promulgated certain "Rules and Regulations" a copy of which is filed with and made a part of the answer of appellees, in which, among other things, manufacturers and dealers authorized to sell liquors are defined, a permit required for those who sell to retail dealers, as well as for such retail dealers to sell liquors, and requiring such permit from all dealers for all liquids, mixtures and preparations containing so much as one-half of one per cent of alcohol and not specifically excepted under Section 4, unless such liquors are shown to be sufficiently denatured or medicated as to be *non-potable*. The "Fourteenth" rule contained in said Rules and Regulations provides that "the latest prohibition department ruling, which is published separate from these rules and regulations, is made a part of these rules and regulations." Pursuant to this rule, the Commissioner of Prohibition has issued "Ruling No. 5," effective January 1, 1931, a copy of which is filed as an exhibit with appellants' bill, in which is classified and listed, (A) liquors the sale of which is prohibited in this state and for which no permit will be issued; (B) liquors to be sold by the drug trade only under permit; (C) liquors which may be sold by all dealers under permit, and

(D) liquors which may be sold by all dealers without permit.

These rules and regulations are designed for the enforcement of the prohibition laws of this state. They do not conflict with any statutory law, but to the contrary are in harmony with and based upon such statutes. By paragraph (7) of Section 4 of Title 27 of the U. S. Code, it is provided that, "'the term 'regulation' shall mean any regulation prescribed by the Commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this title, and the Commissioner is authorized to make such regulations.'" The Federal Courts have held that regulations of department of government reasonably adopted to enforce Act of Congress, administration of which is confided to this department, have the force and effect of law where not in conflict with the express statutory provision. *Dauffer-Liederman Brewing Company* v. *United States,* 36 F. (2nd) 568; *Shatiro* v. *Lyle, Prohibition Administrator,* 30 F. (2nd) 971. We respectfully submit that the same force and effect should be given to the rules and regulations of the Prohibition Commissioner of this state, and that the reasonable rules and regulations promulgated by him when not in conflict with any statutory provision should be upheld.

(e) *Rule "in Pari Materia" not Applicable as Between National Prohibition Act and Earlier Federal Laws.*

To substantiate their contention that appellants' products are not intoxicating liquors within the meaning of the federal statutes pertaining to the interstate transportation of intoxicating liquors, counsel for appellants say that "The term 'intoxicating liquors' as used in the

Federal statutes enacted prior to the passage of the Volstead Act must be defined in the light of the definition as used by Congress in the Volstead Act."

In aid of this proposition, counsel invoke the rule that "All consistent statutes that can stand together though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as consisting one act."

Such rule, however, has no application as between the Webb-Kenyon Act and the Volstead Law. These acts do not relate to the same subject. The former had for its purpose the withdrawing of the protection which might otherwise be given to intoxicating liquor transported from one state to another, when such liquor was intended to be received, possessed, sold or used in violation of the laws of the state into which transported, and was in aid of State enforcement. The latter act dealt with an entirely different subject, that of prohibiting the manufacture, sale, etc., of liquors as defined by the Act, and dealt with National enforcement. They are not Acts relating to the same subject so as to render them in pari materia, and bring them within the rule governing such statute, the object of which is to ascertain and carry into effect the intention of the law making body, and which proceeds on the supposition that the several statutes relating to one subject are governed by one spirit and policy, and are intended to be consistent and harmonious in their several parts and provisions.

Again, the rule in pari materia is applicable only when the terms of the statute to be construed are ambiguous or its significance is doubtful. In *Hamilton* v. *Rathbone*, 175, U. S. 414, 44 L. ed. 219. There is no such imbiguity or doubtful significance in the provisions of the Webb-Kenyon Act as makes it unnecessary to revert to the Volstead Act in its interpretation.

(f) *Rule Enunciated By Courts in Some of the Earlier Cases not Applicable in Determining what Constitutes Intoxicating Liquors Under Modern Conditions.*

To further substantiate their contention, that appellants' products are not "intoxicating liquors" within the meaning of the Federal statutes pertaining to the interstate transportation of intoxicating liquors, counsel for appellants (page 21, Brief) rely on the holding of the court in the Intoxicating Liquor cases, 25 Kansas 751, decided in 1881, that a statute which provided that "All liquors mentioned in section one of this act, and all other liquors or mixtures thereof, by whatever name called, that will produce intoxication, shall be considered and held to be intoxicating liquors within the meaning of the act," did not embrace cologne, extract of lemon, bay rum, paregoric, tincture of gentian and many other medicinal preparations containing alcohol, because they were seldom used as beverages, and that the court would take judicial notice of the uses and character of such articles.

This case was decided in 1881. Since that time and within the last few years, the use of preparations as—or as an equivalent substitute for, intoxicating beverages, has materially changed, to the extent that many mixtures and liquids formerly seldom used as intoxicants are now commonly used as such. If the court, as it did when these cases were decided, could take judicial notice that extract of lemon, bay rum and other similar preparations were seldom used for intoxicating purposes, it would seem that, on the same principle, it can now say that they are now often used as, or, as an equivalent substitute for such purposes. Such reasoning is not without judicial sanction. In *State* v. *Intoxicating Liquors and Vessels*, 106 Atl. 711, decided in 1919, the Maine Supreme Judicial Court, in holding that Jamaica ginger manufactured for flavoring and medicinal purposes, and containing

from 28 to 90 per cent of alcohol, was within a statute forbidding the sale of intoxicating liquors of whatever origin, discussing some of the earlier cases, said:

> "It will be observed that in all earlier cases cited the courts were not dealing with Jamaica ginger. * * * It is a matter of common knowledge, in which all courts share, a knowledge antedating recent legislation or agitation, that for years Jamaica ginger, whatever its merits may be, has been used as a substitute for other intoxicants."

In *Mitchell* v. *Com.* 106 Ky. 602, 51 S. W. 17, the defendant was charged with selling Jamacia ginger, and there was evidence that it contained about 96 per cent of alcohol. The court said:

> "Moreover, we think that, without the druggist's evidence, it is a matter of common knowledge that Jamaica ginger is an intoxicant and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whiskey."

In a later Kansas case, *State* v. *Miller*, 92 Kans. 994, decided in 1914, the court construed the Kansas law of 1909, which made it unlawful for "Any person or persons who shall manufacture, sell or barter any spirituous malt, vinous, fermented or *other intoxicating liquors*," a statute very similar to that on which the decision of the Kansas Liquor Cases, 1881, was based, as prohibiting the sale of Jamaica ginger. Stating that such preparation was, in the United States Dispensatory, classed with those of lemon, vanilla, cinnamon, cloves, camphor, cologne, paregoric, peppermint, wintergreen, and many

others, the court, per Burch, Judge, answering the contention of defendant that the statute should be given the construction as placed upon the one in force in 1881, said:

> "In the case of *State* v. *Ross*, 86 Kan. 799, 121 Pac. 909, an interpretation given the act of 1881 by a decision rendered in 1887 was pressed upon the court. In response it was said: 'The legislature has traveled very far since that statute was enacted and that case was decided, and a person would make a great mistake to rest conduct upon the liquor law as it then stood. The schemes and shifts and devices to evade the law have been so numerous and cunning, and the social benefits hoped for from regulation of the liquor traffic have been so persistently circumvented, that the legislature has felt it necessary again and again to call upon the people to make personal forbearance in the interest of what has been esteemed the general welfare.'"
>
> "One of the perfectly natural and inevitable consequences of the strict enforcement of the prohibitory law was that persons with alcoholic addictions and others desiring the stimulating effect of alcohol should turn to the nearest substitutes for the usual intoxicating agents. In 1881 it was known that persons would use bay rum for purpose of intoxication. *Intoxicating Liquor Cases*, 25 Kan. 751, 762, 37 Am. Rep. 284. *Extract of Lemon* has been used for the same purpose with success. *Holcomb* v. *People*, 49 Ill. App. 73. The same is true of essence of cinnamon. (*State* v. *Muncey*, 28 W. Va. 494), and Jamaica ginger cases are common in the books. . . .
>
> "It will not be assumed that the legislature was ignorant of the fact that persons deprived of their usual stimulants would resort to substitutes, or that dealers with an eye to profit would

supply customers desiring stimulants with fair substitutes. * * *

"The progress of events had been such, when the legislature approached a revision of the law of 1909, that the intellectual, moral, social, and legal atmosphere had become a wholly different medium from that in which the legislature of 1881 labored. If in the act of 1909, which cut off the sale of intoxicating liquors for even medicinal purposes, the legislature had inserted the following definition: All liquors mentioned in Sec. 1 of this act, and all other liquors or mixtures thereof, by whatever name called, which will produce intoxication, shall be considered and held to be intoxicating liquors, * * * no one would have regarded the language as unfortunately chosen, or as tending to produce prejudice against the law, or as unnecessary or unreasonable because reaching culinary, toilet or medicinal preparations in fact intoxicating and used as substitutes for whiskey. The spirit and internal sense of the law would have been regarded as identical with the ordinary and popular signification of the plain words. The suggested definition is precisely the one contained in the law of 1881."

Cases might be cited from other jurisdictions holding that statutes similar to the West Virginia statute, which makes "all mixtures, preparations or liquids, known as 'bitters' or otherwise, which will produce intoxication, whether they be patented or not," spirituous liquors, embrace those preparations or liquids which are intoxicating in fact, but such further citations are deemed unnecessary for the reasons:

First: Because, as hereinbefore shown (V.-d), the court of last resort in West Virginia has construed the

statutory definition of intoxicating liquors to include any fluid or liquid capable of producing intoxication.

Second: Federal courts are bound by the decision of a state court of last resort construing a statute relating to the sale or use of intoxicating liquors within the state. *Adams Express Co.* v. *Kenucky*, 238 U. S. 190, 59 Law Ed. 1267; *Van Oster* v. *Kansas*, 71 Law Ed. 354.

It is respectfully submitted that state legislation relative to intoxicating liquors is not invalid so long as it does not attempt to authorize what the Federal amendment and the National Prohibition Act prohibit; that the laws of the state requiring a permit of dealers, resident or non-resident, for the sale of liquors are valid; that the right of the Commissioner of Prohibition to require such permit thereunder is not superseded or in any way affected by the fact that such dealers hold a permit from the Federal Government; that the laws of the State of West Virginia called into question by this proceeding are valid existing laws; that the Commissioner of Prohibition in requiring a permit from the plaintiff for the sale of the products in question has not exceeded his authority in the enforcement of said laws, and that the decree of the District Court should be affirmed.

HOWARD B. LEE, *Attorney General*,
R. DENNIS STEED, *Assistant Attorney General*,
W. G. BROWN, *State Com. of Prohibition*,
Counsel for Appellees.

April 19, 1932.

SUPREME COURT OF THE UNITED STATES.

No. 599.—October Term, 1931.

McCormick & Company, Inc., and Durham Bros., Inc., Appellants,
vs.
W. G. Brown, State Commissioner of Prohibition of the State of West Virginia, et al., etc.

Appeal from the District Court of the United States for the Southern District of West Virginia.

[May 16, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought by non-resident manufacturers and wholesale dealers to restrain state officers of West Virginia from requiring the complainants to obtain permits from the State Commissioner of Prohibition, and to pay an annual license fee of $50, before shipping certain products into the State to purchasers there for resale.

The bill alleged that, while these products contained ethyl alcohol, they were used and usable solely for medicinal, mechanical, toilet, and culinary purposes, and were not intoxicating liquors or fit for beverage purposes within the meaning of the laws of the United States; that the products were covered by permits issued to the complainants respectively under the National Prohibition Act; and that the shipment and sales in question were to dealers in West Virginia holding state permits. The bill charged that the requirements of the state officers, purporting to act under state legislation, constituted an interference with interstate commerce in violation of the commerce clause of the Federal Constitution, and that the complainants were without remedy at law. In their answer, defendants (appellees) denied that the products in question were used and usable solely for the purposes alleged and that none of the products were "intoxicating liquors" or were non-intoxicating in fact; and, while admitting that the complainants held permits under the National Prohibition Act, defendants asserted the validity of the state laws and regulations by which state permits and the payment of the license fee were required.

— that they

The District Court, composed of three judges (Jud. Code, sec. 266, U. S. C., sec. 380) heard and denied, upon the pleadings and affidavits, an application for an interlocutory injunction. Upon final hearing no further evidence was introduced and from the final decree, dismissing the bill, this appeal has been taken.

The Constitution of West Virginia (Art. VI, sec. 46) prohibits "the manufacture, sale and keeping for sale of malt, vinous or spirituous liquors, wine, porter, ale, beer or any intoxicating drink, mixture or preparation of like nature", except "such liquors for medicinal, pharmaceutical, mechanical, sacramental and scientific purposes" and "denatured alcohol for industrial purposes," dealings in which are permitted under legislative regulations. The legislature was directed to enact such laws as might be necessary to carry these provisions into effect.

The legislative act now in force is Chapter 60 of the West Virginia Official Code (1931). The definition of "liquors" in section one of Article one embraces "all liquids, mixtures or preparations, whether patented or not, which will produce intoxication"[1] By section four, selling or soliciting or receiving orders for "any liquors" is penalized, "except as hereinafter provided"; and "in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier", the sale is deemed to be made in the county of delivery.[2] Exceptions, found in section five[3], in-

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[1] "Sec. 1. The word 'liquors' as used in this chapter shall be construed to embrace all malt, vinous or spirituous liquors, wine, porter, ale, beer or any other intoxicating drink, mixture or preparation of like nature; and all malt or brewed drinks, whether intoxicating or not, shall be deemed malt liquors within the meaning of this chapter; and all liquids, mixtures or preparations, whether patented or not, which will produce intoxication, and all beverages containing one-half of one per cent or more of alcohol, by volume, shall be deemed spirituous liquors, and all shall be embraced in the word 'liquors', as used in this chapter."

[2] "Sec. 4. Except as hereinafter provided, if any person acting for himself, or by, for or through another, shall sell, keep, store, offer, or expose for sale, or solicit or receive orders for, any liquors, or absinthe or any drink compounded with absinthe, he shall be deemed guilty of a misdemeanor for the first offense hereunder, . . . and in case of a sale in which a shipment or delivery of such liquors is made by a common or other carrier the sale thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee."

[3] "Sec. 5. The provisions of this chapter shall not be construed to prevent . . . the manufacture and sale of pure grain alcohol, at wholesale, to druggists, hospitals, sanitariums, laboratories and manufacturers for medicinal,

clude sales of wine for sacramental purposes or of "any United States pharmacopeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law," and this section contains a proviso that no one "shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in section one of this article and as herein excepted, without first obtaining a permit from the commissioner of prohibition so to do." Permits are to be issued for the calendar year, and fees for each permit are prescribed, being fifty dollars in the case of manufacturers and wholesale dealers, ten dollars in the case of purchasers in wholesale quantities of ethyl alcohol, whether pure, medicated or denatured, for use as provided, and two dollars in the case of purchasers, except licensed druggists, in wholesale quantities of liquors, as defined in section one, for sale at retail. By section nine, common carriers are forbidden to carry into the State, or within the State, intoxicating liquors except "pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section

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pharmaceutical, scientific and mechanical purposes, or of wine for sacramental purposes by religious bodies, or to prevent the sale and keeping and storing for sale by druggists of wine for sacramental purposes by religious bodies, or any United States pharmacopoeia or national formulary preparation in conformity with the West Virginia pharmacy law, or any preparation which is exempted by the provisions of the national pure food law; or to prevent the sale by druggists, through pharmacists, of pure grain alcohol for medicinal, scientific, pharmaceutical and mechanical purposes; or to prevent the use of such alcohol by physicians, dentists and veterinarians in the practice of their profession; or to prevent the medication and sale of pure grain alcohol according to formulae and under regulations of the national prohibition act; . . . *Provided*, That no one shall manufacture, sell, keep for sale, purchase or transport any liquors, as defined in section one of this article and as herein excepted, without first obtaining a permit from the commissioner of prohibition so to do. Forms of application and permits shall be prepared by the commissioner and a fee for each permit issued shall be collected by him as follows:

"(a) All manufacturers of liquors and wholesale dealers therein shall pay a fee of fifty dollars for each permit; (b) all purchasers in wholesale quantities of ethyl alcohol in any form, whether pure, medicated, or denatured, for use as herein provided, shall pay a fee of ten dollars for each permit; (c) all purchasers in wholesale quantities of liquors as defined in section one

five".[4] Section eleven makes it unlawful for non-resident dealers to sell to persons within the State intoxicating liquors or any of the preparations described, when they "are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State"; and in case of shipment or delivery by a carrier, the county in which the delivery is made is to be taken as the place of sale.[5]

Section three of Article two of Chapter 60 provides that the manufacture and sale of "liquors" by wholesale druggists and other dealers shall be under the supervision of the commissioner of prohibition and governed by the regulations he may from time to time prescribe. The commissioner's regulations place non-resident manufacturers in the category of "wholesale dealers" and define the business of such dealers as "that of selling at wholesale

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of this article for sale at retail, except duly licensed druggists, shall pay a fee of two dollars for each permit; . . .

"Permits shall be issued for the calendar year and shall expire on the thirty-first day of December next following the issuance thereof. . . . *Provided further*, That such liquors shall be manufactured, sold, kept for sale, transported and used under permits issued by the federal prohibition commissioner and in accordance with regulations issued in pursuance of the national prohibition act."

[4]The provision in Section 9 is as follows: "*Provided further*, That no common carrier, for hire, nor other person, for hire, or without hire, shall bring or carry into this State, or carry from one place to another within this State, intoxicating liquors for another, even when intended for personal use; except a common carrier may, for hire, carry pure grain alcohol and wine, and such preparations as may be sold by druggists for the special purposes and in the manner as set forth in section five of this article."

[5]"Sec. 11. . . .

"It shall be unlawful for any nonresident vendor, dealer or other person to sell or furnish any malt, brewed, vinous, or fermented liquors, intoxicating liquors, or any mixture, compound or preparation, whether patented or not and whether intoxicating or not, to any person, corporation or firm within the territory of this State, when such liquors, mixture, compound or preparation, or any of them, are intended by any person interested therein to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of the prohibition laws of this State; and in case of such sale or furnishing in which a shipment or delivery of such liquors is made by a common or other carrier, the sale and furnishing thereof shall be deemed to be made in the county wherein the delivery thereof is made by such carrier to the consignee, his agent or employee".

ethyl alcohol in any form . . . and wine as permitted and supervised by the Federal Government; or selling . . . any liquid, mixture, or preparation . . . which will produce intoxication, or coming within the definition of 'liquors' in section one" of the statute. These dealers, it is provided, upon obtaining a permit from the state commissioner, may sell such liquors at wholesale for medicinal, pharmaceutical, scientific and mechanical purposes to persons holding permits to purchase. The regulations also classify alcoholic preparations, as those regarded as beverages, the sale of which is forbidden, and those which comprise articles having a recognized legitimate use and which can be sold under permits, the latter including a large variety of preparations with a described alcoholic content, such as proprietary medicines, tonics, cordials, elixirs, lotions, extracts and flavors, and various compounds bearing trade names.

Complainants' products fall within these regulations. They contain ethyl alcohol ranging, according to the allegation of the bill as to the foodstuffs and toilet articles of one of the complainants, "from four per cent to ninety per cent ethyl alcohol by volume". There is no charge that applications by complainants for permits have been denied. On the contrary, the bill of complaint alleged that complainants have either procured the required permits from the state commissioner, on the payment of the prescribed fee, or "have refused to procure such permits and refrained from shipping said products into said State". The question is simply one of the authority of the state officers to demand that state permits be obtained.

The District Court found that the products in question are "liquors" within the meaning of the state statute, and we see no ground for a contrary conclusion. *State* v. *Muncey*, 28 W. Va. 494; *State* v. *Good*, 56 W. Va. 215; *State* v. *Durr*, 69 W. Va. 251; *State* v. *Henry*, 74 W. Va. 72. Nor do we think that the regulations of the commissioner go beyond the authority which the statute confers. No state decision to that effect has been cited, and examination of the statutory provisions we have quoted gives no support to the contention that the commissioner has misconceived his duty. On the application for injunction the complainants presented affidavits to show that their products, as required by Federal law and regulations, were unfit for beverage purposes and that consumption of them as a beverage "would involve serious gastric

irritations or disorders, or nausea, and, in some cases, if persisted in, serious illness", and that the products were sold strictly "for medicinal, toilet, and culinary purposes". Defendants denied the unfitness for beverage use, and, in support, submitted an affidavit of the chemist who had been employed by the state department to examine preparations covered by the commissioner's regulations, including products of this sort submitted by one of the complainants on its application for a state permit. This witness testified that these various preparations, falling within the above-mentioned classes of the regulations, are such as "will produce intoxication and drunkenness" and he based this statement on the "alcoholic content, the potability and the physiological effect of the final product, and upon his actual experience and observation that said preparations are intoxicating in fact".

We may lay the controversy of fact on one side, so far as it relates to the particular products of complainants, as the question is not merely that of the normal uses and purposes of these preparations which have alcoholic content and come within the state law, but whether, in view of that content and of possible abuses, the State has the power to put the sale of such products under the prescribed administrative supervision. There is no basis for objection because of any arbitrariness in the State's requirements as they are appropriately directed to the enforcement of its prohibitory legislation. *Purity Extract Company* v. *Lynch*, 226 U. S. 192, 204; *Eberle* v. *Michigan*, 232 U. S. 700, 706; *Vigliotti* v. *Pennsylvania*, 258 U. S. 403, 407. The question before us is thus the narrower one whether the State's authority extends to the complainants' transactions in the light of their interstate character and of the Federal legislation asserted to be applicable.

Prior to the adoption of the Eighteenth Amendment, the Congress, exerting its constitutional power of regulation, had prohibited the movement in interstate commerce into any State of intoxicating liquors for purposes prohibited by the state law. The Webb-Kenyon Act[6] (Mar. 1, 1913, c. 90, 37 Stat. 699; U. S. C., Tit.

[6]The Webb-Kenyon Act is entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases", and provides: "That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State,

27, sec. 122). See, also, the Wilson Act (Aug. 8, 1890, c. 728, 26 Stat. 313; U. S. C., Tit. 27, sec. 121) and the Reed Amendment (Mar. 3, 1917, c. 162, sec. 5, 39 Stat. 1069; U. S. C., Tit. 27, sec. 123). With direct application to the prohibition law of West Virginia (the predecessor of the present statute and having a similar definition of "liquors", West Virginia Laws, 1913, chap. 13), this Court held that the purpose of the Webb-Kenyon Act "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught". The Act was said to operate "so as to cause the prohibitions of the West Virginia law against shipment, receipt and possession to be applicable and controlling." *Clark Distilling Company* v. *Western Maryland Railway Co.*, 242 U. S. 311, 324. See, also, *Seaboard Air Line Railway Co.* v. *North Carolina*, 245 U. S. 298, 303, 304; *United States* v. *Hill*, 248 U. S. 420, 424, 425; *Williams* v. *United States*, 255 U. S. 336; *Rainier Company* v. *Great Northern Company*, 259 U. S. 150, 152. The appellants do not urge, and there would be no ground for such a contention, that either the Eighteenth Amendment or the National Prohibition Act had the effect of repealing the Webb-Kenyon Act. The Congress has not expressly repealed that Act, and there is no basis for an implication of repeal. The Eighteenth Amendment and the National Prohibition Act have not superseded state prohibitory laws which do not authorize or sanction what the constitutional amendment prohibits. *Vigliotti* v. *Pennsylvania, supra.* Such laws derive their force not from that amendment but from power originally belonging to the States and preserved to them by the Tenth Amendment. *United States* v. *Lanza*, 260 U. S. 377, 381; *Hebert* v. *Louisiana*, 272 U. S. 312, 315; *Van Oster* v. *Kansas*, 272 U. S. 465, 469. As the prohibitory legislation of the States may

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Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the States' valid prohibitions.

The appellants contend, however, that the products in question are not "intoxicating liquors" within the meaning of the Webb-Kenyon Act. They insist that this term as used in that Act must be defined in the light of the terms of the subsequent National Prohibition Act. They refer to the exemptions in the later Act with respect to such articles as medicinal and toilet preparations, proprietary medicines and flavoring extracts, when manufactured and prepared for the market under required permits. U. S. C., Tit. 27, sec. 13. But these provisions were not in contemplation at the time of the passage of the Webb-Kenyon Act and cannot operate to restrict the natural significance of the terms of that Act as they were adopted by the Congress and have been left unrepealed. That Act did not attempt to establish a definition of intoxicating liquors. It expressly referred to the prohibitory laws of the States, the enforcement of which it was intended to aid. The Congress undoubtedly recognized, as this Court had decided, that the State could prohibit the sale of liquor absolutely or conditionally. It could prohibit sale as a beverage and permit sale for medicinal and like purposes. It could prohibit sale by merchants and permit it by licensed druggists. *Eberle* v. *Michigan, supra; Kidd* v. *Pearson,* 128 U. S. 1, 19; *Rippey* v. *Texas,* 193 U. S. 504, 509; *Crane* v. *Campbell,* 245 U. S. 304, 307; *Vigliotti* v. *Pennsylvania, supra.* If preparations by reason of their alcoholic content would be intoxicating, and could be used for beverage purposes, unless so treated as to render them unfit for such purposes, the States were clearly at liberty to insist, within the range of their authority, upon being satisfied that such preparations had been so treated and to establish administrative control to that end. *Seaboard Air Line Railway Co.* v. *North Carolina, supra.* When the definition of intoxicating liquors, as set forth in state legislation and as applied to such preparations, is not an arbitrary one—and it cannot be regarded as arbitrary in the instant case—the Webb-Kenyon Act must be taken as referring to the liquors which the state legislation describes, or the plain purpose of the Act would be frustrated. The same reasons which lead to the conclu-

sion that the Webb-Kenyon Act was not repealed by the National Prohibition Act, compel the view that the scope of the application of the former was in no way limited by the latter.

The appellants make the further point that the Webb-Kenyon Act applies only where there is an intent to violate the laws of the State into which the shipment is made. The Act prohibits the shipment or transportation of intoxicating liquor into a State when it "is intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State". The argument is that no intent to violate the laws of West Virginia can be imputed to the appellants. It is said that they ship their products only to licensed dealers in West Virginia, that is, to those who are authorized by the state commissioner of prohibition "to receive, store, and sell the same". The short answer is that the state law does not make the permits issued to local dealers a substitute for the permits required of wholesale dealers. If the provisions of the state law, and the regulations under it, which expressly require state permits for sales by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the state law within the meaning of the Webb-Kenyon Act. The appellants in making the sales are obviously interested persons, and the shipment of their products into the State for the purpose of there consummating their sales without the described permits would fall directly within the terms of that Act.

In determining the ultimate question of the validity, not simply of the State's prohibitory legislation in its general features, but, in particular, of its requirement of permits as to products for which Federal permits have been issued, we need only refer to the criterion established by the decisions of this Court. While state legislation cannot give validity to acts prohibited by the Eighteenth Amendment, that legislation may provide additional instruments to make prohibition effective. That the State may adopt appropriate means to that end was expressly provided in section two of the Amendment in declaring that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation". *National Prohibition Cases*, 253 U. S. 350, 387; *Vigliotti* v. *Pennsylvania*, *supra*. The Court

said in *United States* v. *Lanza, supra:* "In effect the second section of the Eighteenth Amendment put an end to restrictions upon the State's power arising out of the Federal Constitution and left her free to enact prohibition laws applying to all transactions within her limits. To be sure, the first section of the Amendment took from the States all power to authorize acts falling within its prohibition, but it did not cut down or displace prior state laws not inconsistent with it. . . . We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the Amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other." See, also, *Hebert* v. *Louisiana, supra.* The mere fact that a state statute has broader scope than a provision of the National Prohibition Act upon the same subject does not affect its validity. *Van Oster* v. *Kansas, supra.* Different and higher penalties may be provided by the state law. *Edwards* v. *Georgia,* 150 Ga. 754, affirmed 258 U. S. 613; *Chandler* v. *Texas,* 89 Tex. Cr. 306, affirmed 260 U. S. 708. State legislation imposing punishment for the sale of liquor without a state license may be enforced. *Molinari* v. *Maryland,* 141 Md. 565, affirmed 263 U. S. 685, 686; *Weisengoff* v. *Maryland,* 143 Md. 638, affirmed 263 U. S. 685, 686; *Colora* v. *New Jersey,* 97 N. J. Law 316, affirmed 267 U. S. 576. In *Moore* v. *Idaho,* 36 Idaho 565, affirmed 264 U. S. 569, Moore was convicted of having intoxicating liquor in his private dwelling in violation of the state law, notwithstanding the stipulation that his possession was "permitted by and lawful under the provisions of section 33 of the National Prohibition Act". U. S. C., Tit. 27, sec. 50. See, also, *Campbell* v. *North Carolina,* 182 N. C. 911, affirmed 262 U. S. 728; *Barnes* v. *New York,* 266 U. S. 581; *Colonial Drug & Sales Co.* v. *Western Products Co.,* 54 F. (2d) 216.

Applying the principle thus repeatedly declared, we are of the opinion that the provisions of the National Prohibition Act relating to the issue of permits did not supersede the authority of West Virginia to require state permits, as in the instant case, in the appropriate enforcement of its valid legislation.

Decree affirmed.